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Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of The United States

October Term, 2000

CO-STEEL RARITAN

Petitioner,

v.

NEW JERSEY BOARD OF PUBLIC UTILITIES

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of New Jersey

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a party's economic benefit under a contract may be wholly or virtually destroyed by state regulation consistently with the impairment of Contracts Clause?

2. Whether a single consumer of electricity can be arbitrarily excluded from a statutorily mandated guaranteed rate reduction for "all customer classes" consistently with the requirements of Equal Protection?

3. Whether a state regulatory agency consistently with the requirements of Due Process may base adjudication on extra-record sources, without prior notice to the parties of such an intent, without affording the right to cross-examine or make meaningful comment on such extra-record sources, and without providing a meaningful rationale for its actions?

LIST OF PARTIES

The following parties participated in the appeals of the Final Decision and Order of the New Jersey Board of Public Utilities:

Co-Steel Raritan
Division of the Ratepayer Advocate, State of New Jersey
Enron Energy Services
Independent Energy Producers of New Jersey
Jersey Central Power & Light Company
New Jersey Board of Public Utilities
New Jersey Business Users
New Jersey Commercial Users
Public Service Electric & Gas Company
Rockland Electric Company
Tosco Refinery Company

The following additional parties participated in the administrative proceeding before the New Jersey Board of Public Utilities

Allen Goldberg Atlantic City Electric Company
Citizens Against Rate Escalation
Coalition for Fair Competition
Cogen Technologies Energy Group
County of Passaic, New Jersey
Duke Energy Trading and Marketing, L.L.C.
Electric Clearinghouse, Inc.
International Brotherhood of Electrical Workers, Local 94
Mid-Atlantic Power Supply Association
National Resources Defense Council
New Jersey Industrial Consumer Group
New Jersey Public Interest Intervenors
New Jersey Transit Corporation

RULE 29.6 LISTING

Co-Steel Raritan is a wholly owned subsidiary of Co-Steel, Inc. As far as management is aware, no publicly held company owns ten percent or more of the stock of Co-Steel, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Co-Steel Raritan, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of New Jersey in this case.

OPINIONS BELOW

The Order of the Supreme Court of New Jersey (App., *infra*, 1a), is not reported. The opinion of the Superior Court of New Jersey Appellate Division (App., *infra*, 14a) is reported at 330 N.J.Super. 65, 748 A.2d 1161 (2000).

JURISDICTION

The New Jersey Supreme Court entered its Order on December 6, 2000. (App., *infra*, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 10, of the Constitution of the United States provides, in relevant part, that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that "No State shall . . . deprive any person of . . . property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT

On July 15, 1997, Co-Steel's electric utility, Public Service Electric & Gas Company ('PSE&G'), filed an application with the New Jersey Board of Public Utilities ('BPU') requesting authority to unbundle its rates,[1] restructure its operations, determine the amount of recoverable stranded costs,[2] and set the level of related stranded cost charges[3] in anticipation that New Jersey's electric markets would soon be opened to competition.[4] The BPU reserved for itself issues

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[1] In the regulatory regime that existed in the United States throughout the last century, electric utilities provided integrated "bundled" services (*e.g.*, generation, transmission, distribution, meter reading, billing, etc.) for which they charged a single, "bundled" rate.

[2] "Stranded cost" is a term used to describe utility investments made in a regulated environment that the utility claims have been rendered uneconomic through deregulation of the electric industry. App., *infra*, 378a.

[3] *I.e.*, charges designed to recover a utility's stranded costs.

[4] On June 8, 1999, PSE&G initiated a separate proceeding (BPU Docket No. EF99060390) to request authority, pursuant to the Deregulation Act, to recover and securitize its bondable stranded costs and impose a transition bond charge on its customers. On July 9, 1999, Co-Steel filed a motion to intervene in Docket No. EF99060390. On September 17, 1999, the BPU issued an order

regarding restructuring and held hearings on that issue between April 27 and May 28, 1998. The BPU assigned an administrative law judge to conduct an adjudicative hearing on disputed issues of material fact in the unbundling and stranded cost filing. In the course of that hearing, conducted between February 9 and May 28, 1998, numerous parties, including the New Jersey Ratepayer Advocate,[5] submitted evidence addressing the broader issues presented by the application, including the existence and amount of PSE&G's stranded costs and stranded cost charges. Co-Steel introduced testimony and documentary evidence to support its position that the imposition of stranded cost charges on Co-Steel would violate a 1995 contract between Co-Steel and PSE&G ('Contract')[6] and, if authorized by the BPU, would unconstitutionally impair the obligations of that Contract.[7]

The Contract had previously been approved by both the state attorney general acting on behalf of the State of New Jersey and the BPU.[8] Under that Contract, Co-Steel continued to receive the same kind of interruptible, non-firm electric

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denying Co-Steel's motion to intervene. The appeals of the BPU's decisions in this docket were consolidated in the superior court.

[5] The office of Ratepayer Advocate operates as a division of the BPU, charged with the responsibility "to represent, protect, and advance the interests of all consumers of utility services, including residential, small business, commercial, and industrial ratepayers, in an effort to protect and promote the economic interests of all New Jersey ratepayers." N.J.S.A. 13:1D-1, at 29.

[6] The text of the Contract appears in the Appendix, *infra*, 414a. In addition to the discussion here, its provisions are described in greater detail, *infra*, 7-9.

[7] App. *infra*, 374a -396a and 397a-446a.

[8] *In the Matter of the Petition of Public Service Electric & Gas Company for Approval of an Experimental Hourly Energy Pricing Tariff*, Docket No. ER9501005, 165 P.U.R.4th 444, Order of November 17, 1995.

service as it had since 1980.[9] The Contract provides, however, that Co-Steel's rates and charges would be governed by a unique, dual tariff structure, that reduced Co-Steel's electric costs by approximately twenty-five percent (a savings of $6 million per year).[10] In exchange for this reduced rate, Co-Steel agreed to 1) abandon its plans to move its operations to another state; 2) invest at least $37 million in new capital at its New Jersey plant; and 3) remain a retail customer of PSE&G for the ten-year term of the Contract, thus waiving for that period its ability to obtain electric service from an alternative electricity provider in the event of deregulation.[11]

The ALJ issued his Initial Decision on August 17, 1998. Although extensive, that decision did not address the constitutional issue raised by Co-Steel, thereby implicitly holding Co-Steel subject to stranded cost charges.[12] The Initial Decision also failed to quantify either the value of PSE&G's assets or its stranded costs.[13] Co-Steel and others filed exceptions with the BPU in October, 1998.[14]

While those exceptions were pending, a number of events occurred. Principal among these was the enactment, on February 9, 1999, of New Jersey's Electric Deregulation and Energy Competition Act ('Deregulation Act' or 'Act').[15]

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[9] "Non-firm" electric service can be interrupted at the discretion of the utility under such terms and conditions as contained in the applicable interruptible service tariff and/or contract. Because the utility is not unconditionally obligated to serve interruptible load it need not dedicate a corresponding amount of generation or transmission assets to serve it. *See* App., *infra*, 391a.

[10] App., *infra*, 32a-33a, 383a-384a.

[11] App., *infra* 32a, 408a-409a.

[12] App., *infra* 203a.

[13] App., *infra* 26a.

[14] App., *infra* 26a.

[15] N.J.S.A. 48:3-49, *et seq.*

Among other things, the Act directed that retail competition be implemented by August 1, 1999, provided a general framework for the establishment of and transition to a competitive electric industry, established specific requirements for the determination of the market value of utility assets and other issues, including recovery of stranded costs, authorized the issuance of bonds to 'securitize' utilities' stranded costs,[16] authorized utilities to transfer their generation assets to affiliates, and directed that "each customer class" of "each public utility" receive a 5% rate reduction by August 1, 1999, and at least a 10% rate reduction by August 1, 2002, "relative to the aggregate level of bundled rates in effect as of April 30, 1997 . . . ."[17]

On March 8, 1999, several parties sought, unsuccessfully, to re-open the record to permit the introduction of new evidence in light of the requirements of the Deregulation Act.[18] On March 17, 1999, several parties submitted a non-unanimous settlement agreement[19] in which PSE&G revealed for the first time that it intended to revise its restructuring plan and immediately transfer its generating assets to an unregulated affiliate.[20]

In a Summary Order issued on April 21, 1999, the BPU essentially accepted the revised plan of operation included in the non-unanimous settlement agreement as the basis for its

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[16] Through securitization, the utility issues and receives in a lump sum the proceeds from bonds and the debt service is paid by the ratepayers thereby greatly accelerating what would otherwise have been its revenue stream from these assets under the previous regulatory regime.

[17] N.J.S.A. 48:3-52(4)(d). *See* App., *infra*, 27a

[18] *See* App., *infra*, 365a, *et seq.*

[19] App, *infra*, 28a

[20] Its filed plan provided for these assets to be retained for at least seven years.

subsequent decisions.[21] The BPU issued its Final Decision and Order ('Final Order') on August 24, 1999.[22] Among other things, the Final Order fixed the value of PSE&G's assets and the amount of its stranded costs based upon the report of a BPU-employed consultant, which had never been introduced as evidence in any of the hearings.[23] With regard to the issues raised by Co-Steel, the BPU found that "there is no legal basis in the Act for an exclusion for Co-Steel from paying "Stranded Costs." It also noted that "the price [of Block 2 usage] will be unaffected by this Order,"[24] thereby precluding Co-Steel from receiving the statutory rate reductions on two-thirds of its energy purchases.

As explained in greater detail below,[25] Co-Steel and several other parties pursued timely motions for rehearing and subsequent appeals. Co-Steel argued therein that the BPU's decision regarding stranded costs violated and unconstitutionally impaired its Contract and, in the alternative, that its decision regarding the statutory decrease in rates violated the Deregulation Act and principles of equal protection.[26] Other parties challenged the BPU decision on

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[21] App., *infra*, 356a.

[22] App., *infra*, 165a.

[23] App., *infra*, 26a, 316a

[24] App., *infra*, 335a. Consistent with the Board's August 24, 1999 ruling, the September 17, 1999 Bondable Stranded Costs Rate Order authorized PSE&G to securitize part of its stranded costs through the issuance of up to $2.525 billion in transition bonds, and to set a Transition Bond Charge to recover these costs from the ratepayers. The Order requires the TBC to be assessed against and "apply equally to each customer of [PSE&G], regardless of class, based on the amount of electricity delivered to the customer...through the transmission and distribution system of [PSE&G] or any successor electric public utility."

[25] *Infra* 13-15.

[26] While the principal focus below was on statutory construction and contract impairment issues, Co-Steel consistently raised the equal protection question in connection with that portion of the BPU's decision

due process and numerous other grounds. Those motions and appeals were all denied.[27]

Determining whether the actions of the BPU constitute an impairment of Co-Steel's contract with PSE&G requires an understanding of that contract and of the state action that will cause the Contract to be impaired. Likewise, determining whether the BPU's actions deprived Co-Steel and other intervenors of their right to a fair and impartial hearing requires an understanding of the procedural irregularities below.

A. Co-Steel and its Contract with PSE&G[28]

Co-Steel operates a steel 'minimill' at Perth Amboy, New Jersey. A steel mini-mill uses electric arc furnace technology to manufacture steel by melting scrap metal, rather than processing iron ore. The mill produces various grades of wire rod for a wide variety of uses. Wire rod is sold in highly competitive commodity markets wherein customer choices are largely driven by price and availability of product. The price of scrap and electricity account for two of the three most significant operating costs incurred by the Perth Amboy mill, the other being labor.

An electric arc furnace consumes large amounts of electricity. Co-Steel's load peaks at almost 100 megawatts and its annual energy consumption exceeds 440,000,000 kwh, which is about 1% of PSE&G's total energy sales.

Because of New Jersey's high energy costs relative to the jurisdictions in which Co-Steel's principal competitors were located, Co-Steel in 1994 was actively considering

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denying Co-Steel the full benefit of the statutory rate reduction. Brief of Appellant Co-Steel Raritan (N.J. S.Ct.) at 16 (August 21, 2000); Brief of Appellant Co-Steel Raritan (N.J. Sup. Ct., App. Div.) at 49 (December 10, 1999).

[27] App., *infra*, 94a, 14a, 1a-13a.

[28] *See generally*, App., *infra*, 32a-33a, 374a, *et seq.*

closing its Perth Amboy mill and relocating in another state, within the service territory of a lower cost utility. To foreclose that possibility and maintain Co-Steel as a customer, PSE&G offered to enter into a unique, special contract. As finally negotiated, the Contract provides that power supplied above 6 MW is non-firm; *i.e.*, interruptible by PSE&G on 30 minutes notice for up to 150 hours annually, and priced in two separate blocks. Block 1, applicable to the first 13 million kwh consumed each month (approximately one-third of Co-Steel's electric consumption), is billed under PSE&G's HTS tariff for transmission level service, but with a specialized fuel adjustment that differs from what was at the time PSE&G's standard fuel adjustment. Consumption in excess of 13 million kwh (Block 2) is billed under PSE&G's EHEP Tariff at the hourly marginal cost of energy, adjusted for losses, plus a fixed cost contribution, Gross Receipts and Franchise Tax set at 0.5295 cents per kwh, and the Remediation Adjustment Charge applicable to PSE&G's HTS tariff. For its part, Co-Steel agreed that PSE&G would be the sole source of electrical power for the Perth Amboy plant during the term of the agreement and that Co-Steel would invest at least $37 million in new capital in the Perth Amboy plant within the first four years. Because of the tax revenues and number of jobs at stake if Co-Steel were to leave its jurisdiction,[29] the State of New Jersey participated in the negotiations and, as an added inducement to the Contract, granted PSE&G special tax relief. The state attorney general approved the Contract, as did the BPU. As a result of this action, Co-Steel elected to remain in New Jersey, satisfied its capital investment

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[29] Co-Steel then employed more than 470 people at the Perth Amboy mill, representing a direct payroll of some $28 million and associated fringe benefits and payroll taxes approaching $11 million per year. In addition, Co-Steel annually pays local and State taxes on the order of $2 million and buys more than $50 million worth of goods and services from New Jersey vendors (exclusive of electricity).

obligations, and reduced its annual electric costs from over $24 million to about $18 million.

B. The Actions of the State that Impair the Contract

The stranded cost charges that the BPU ruled could be imposed upon Co-Steel impair the Contract in two fundamental ways. First, as noted above,[30] a stranded cost charge provides for the *current* recovery of a utilities' *previous* investment in facilities rendered uneconomic by virtue of the transition to a competitive regime. The Contract constitutes an agreement on the part of PSE&G to recover from Co-Steel less than the amount to which it would otherwise have been entitled to earn on its *previous* investment if service had been provided under one or more other tariffs. By imposing stranded cost charges upon Co-Steel, the state has increased the charges collected for the service PSE&G *currently* provides in order to generate revenue for *previous* investment that PSE&G, with previous BPU approval, had agreed to forego. Whether coincidentally or not, the amount of these charges (between $4.5 and $6.0 million annually), over the fifteen year term during which PSE&G is authorized to collect them, essentially equals or exceeds the aggregate $60 million cost reduction that Co-Steel obtained during the term of the Contract.

Second, the Contract anticipates and the parties clearly intended that at the end of its term Co-Steel would be free to choose whether to continue taking service from PSE&G under whatever terms and conditions might then apply or be negotiated or elect to take service from an alternative provider.[31] On its face, the Final Order appears to preserve that freedom, but that is illusory. If Co-Steel exercises its right to switch suppliers, the transition charges authorized by the BPU will allow PSE&G to

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[30] *Supra*, n. 2.

[31] *See* App., *infra*, 406a-409a.

collect from Co-Steel an amount in excess of $5 million per year for perhaps ten or more years beyond the Contract term. The practical effect of this is equivalent to an outright prohibition on switching: any switching of electric suppliers will be economically infeasible. Co-Steel thus will be tied to PSE&G for years after its current contract expires.

As the undisputed record evidence demonstrates,[12] these factors essentially negate the economic value of the Contract to Co-Steel. Under the guise of "stranded costs," PSE&G receives from Co-Steel increased revenues that, coincidentally or not, are essentially equal to the amount by which it had agreed to reduce its rates in the Contract. Co-Steel, on the other hand, having paid full consideration for what has now been taken away, will get the dubious privilege of being the only customer in the state obligated by contract to remain a customer of its utility after August 1, 1999, as well as the only customer in the state to which the full rate reduction of the Deregulation Act does not apply.

C. The Irregularities in the Conduct of the Administrative Proceeding

As the title of its application implies, the determination of the amount of PSE&G's stranded costs and the related stranded cost changes was an essential element of this proceeding. It is undisputed that the determination of that question involved the determination of adjudicative facts involving such things as the value of PSE&G's assets, and the BPU acted appropriately when it referred that issue, among others, to a state administrative law judge for an evidentiary hearing. The hearing, however, took place before the Deregulation Act passed and before PSE&G changed its restructuring proposal. Thus, the testimony submitted, the cross-examination conducted, and the briefs submitted by the

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[12] App., *infra*, 374, *et seq.*

parties addressed an application and a body of law that was soon to be radically altered.

Apart from this obvious problem, the Initial Decision of the ALJ failed, among other things, to fix the value of PSE&G's assets, as well as the amount of the utility's stranded costs. Nonetheless, the BPU did not remand for further hearings, did not conduct its own evidentiary hearings, and did not even conduct its own independent review of the evidence before the ALJ. Instead, it relied upon a consultant's report that was never made part of any evidentiary record.[11] Unlike the witnesses who testified on those issues before the ALJ, the qualifications, sources of information and opinions of the individuals who prepared this report were never subject to cross-examination. The parties who had participated in the evidentiary hearings that were supposed to determine this issue were given no opportunity to submit testimony or other evidence to either support or dispute the consultant's report. Indeed, only to the extent that they could have guessed it would be relied upon by the BPU could it be said that the parties had an opportunity to comment upon it. For apart from making it public, the BPU provided absolutely no notice that the report might be used to interpret, let alone supplant or modify, the record developed by the ALJ.

The BPU further compounded these problems by permitting PSE&G to materially amend its application after the hearing and denying the request of the Ratepayer Advocate and others to re-open the evidentiary record.

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[11] The BPU "released" the audit report that addressed unbundling and stranded cost matters -- the issues assigned to the ALJ -- on March 5, 1998. The only testimony from these auditors occurred in the course of the hearing conducted by the BPU on *restructuring* issues. App. *infra*., 26a.

D. The Failure of the BPU To Clearly Articulate its Decisions

Finally, the BPU failed to articulate any rational basis for a number of critical decisions. For example, the BPU's *entire* explanation for its multi-billion dollar decision regarding the value of PSG&E's stranded costs is this:

> [B]y letter dated November 18, 1998, the Auditors submitted to the Board a proposed quantification of the ALJ's stranded cost recommendations, reflecting a range of values based on three scenarios, from a low end of $2.485 billion, to a mid-range of $2.949 billion, to a high end of $3.320 billion. We **HEREBY ACCEPT** as reasonable, with one minor modification discussed below, the Auditor's mid-range quantification of the ALJ's decision with respect to PSE&G's net-of-tax owned generation stranded costs of $2.949 billion.[34]

Nowhere in its decision is there a single word as to why the selected value was accurate or likely to be more accurate than either of the two other estimates in the auditors' report or any of the evidence in the record of the evidentiary hearing. Even the conclusion that its decision was based on nothing more than a compromise is left entirely to inference.

The "minor modification" to which the passage above makes reference is a $9 million reduction in the auditor's mid-range estimate of stranded cost to reflect emission credits, an adjustment which the ALJ thought appropriate, but which he also did not quantify. The BPU's entire articulation of its rationale for this reduction is as follows:

> [T]he Auditors did not include any value for nitrogen oxide and sulfur dioxide emission credits, which adjustments the ALJ found appropriate. We

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[34] App., *infra*, 316a (emphasis in original).

> note that NJPII,[35] which recommended this adjustment, did not provide a quantification of these credits. While it is difficult to estimate the value of these credits with precision at this time, based on our judgment, we believe it fair to adjust the net-of-tax stranded cost amount of $2.949 billion to $2.94 billion to impute a value for these credits, consistent with the ALJ's findings.[36]

Once again, this example illustrates the lack of any articulated basis for its decision.

Indeed, one can search the entire record and find no list of the specific assets that PSE&G decided, after the close of the record, to transfer to an unregulated affiliate. Nowhere in the record is there real evidence of the 'market value' of those assets, despite the fact that the Deregulation Act specifically required the use of that standard.[37] The 'unusual' nature of the BPU's adherence to due process was acknowledged, but glossed over by the courts below.

E. Proceedings Below

Because the administrative proceedings below themselves constitute the basis for Co-Steel's appeals, they are described in the Statement, *infra*, at 2 - 7, and will not be repeated here. The BPU issued its Final Order on August 24, 1999.[38] Co-Steel filed a timely Motion for Reconsideration, which the BPU denied on October 19, 1999.[39]

Co-Steel and the New Jersey Business Users Association ('NJBU'), filed timely appeals with the New Jersey Superior

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[35] New Jersey Public Interest Intervenors.

[36] App., *infra*, 316a.

[37] N.J.S.A. 48:3-61(e)

[38] App., *infra*. 165a.

[39] App., *infra*, 94a.

Court.[40] Although the Ratepayer Advocate appeared as a Respondent,[41] the Ratepayer Advocate and NJBU both challenged the Final Order on grounds of procedural due process.[42]

In its decision, the superior court acknowledged that,

> [t]he administrative proceedings leading up to these decisions were unusual in many ways: hearings on the unbundling, stranded costs, and restructuring issues were held before an administrative law judge before the Act was passed; the securitization issue invited comments from interested parties but no hearings. Quasi-legislative public hearings were held on deregulation three years before the Act actually was introduced in the Legislature. The BPU's Final Decision relied heavily on a negotiated agreement between PSE&G and seven [out of 23] intervenors . . . .[43]

The court dismissed this 'unusual' procedure, saying:

> Despite the unusual procedural irregularities, however, we conclude that all parties had ample opportunity to be heard on all aspects of both decisions. We find no denial of due process and no fundamental unfairness.[44]

The court affirmed in all respects.

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[40] App., *infra*, 19a.

[41] App., *infra*, 29a.

[42] App., *infra*, 42a. Despite the fact that these issues were not raised by Co-Steel, they were pressed by others and passed upon below, and certiorari is therefore proper. *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *Virginia Backshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 (1991); *Stevens v. Dept. of Treasury*, 500 U.S. 1,8 (1991).

[43] App., *infra*, 20a.

[44] App., *infra*, 20a.

The Ratepayer Advocate filed with the New Jersey supreme court a petition for certification of the judgment, which the court granted on July 14, 2000.[45] Co-Steel filed an appeal as of right, which the supreme court treated as a petition for certification, which it granted, in part, on the same date.[46] The Court ordered the parties to file supplemental briefs on designated issues, including in connection with Co-Steel's appeal,[47] "the economic effect of the BPU's disposition of the enumerated issues and the economic impact that would result from the adoption of the position advocated by Co-Steel Raritan in respect of those issues...."

On December 6, 2000, one month after oral argument, the supreme court issued the following order:

> The Supreme Court having carefully considered the record, the briefs of the parties and *amici curiae*, and the argument of counsel,
>
> And the Court having determined that it is in the public interest to expedite the disposition of the within appeals;
>
> And good cause appearing:
>
> IT IS ORDERED that the judgment of the Appellate Division is affirmed. The opinions of the Court will be filed in due course.[48]

The order was served upon the parties accompanied by a letter from the clerk inviting them to "take whatever action is appropriate in light of the Court's ruling."[49]

No opinion has, as yet, been issued by the court.

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[45] App., *infra*, 13a.

[46] App., *infra*,11a.

[47] App., *infra*, 7a and 5a.

[48] App., *infra*, 1a.

[49] App., *infra*, 4a.

REASONS FOR GRANTING THE PETITION

Petitioner concedes that this case does not present a case in conflict with decisions of the courts below, nor a conflict among federal courts. It is, however, an important case and warrants review for the following reasons:[50]

First, the case presents issues, properly raised below, arising under the United States Constitution, involving substantial property interests of Co-Steel and others.[51] It raises a significant question as to whether, in resolving those issues, prior decisions of this Court have been properly interpreted and applied.[52] It raises the equally significant question as to whether the institutions of state government were here all too willing to sacrifice the inconvenient rights of Co-Steel and other ratepayers because they threatened to get in the way of a state initiative, involving billions of dollars,

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[50] *See Hill v. Colorado*, 530 U.S. 703, (2000)(granting certiorari because of the "importance of the case"). *See also Bush v. Gore*, No. 00-949, __U.S. __, 121 S.Ct. 525, 533 (2000), U.S. Lexis 8430 (U.S., December 12, 2000)("When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.) ".

[51] *See Lucas v. South Carolina Coastal Counsel*, 505 U.S. 1003, 1007 (1992)(granting certiorari to review whether South Carolina's enactment of an act that effectively barred petitioner from building structures on his land and dramatically reduced its economic value accomplished a taking under the Fifth and Fourteenth Amendments requiring payment of just compensation).

[52] *See, e.g., Bullington v. Missouri*, 451 U.S. 430, 432 (1981)(granting certiorari to determine the scope of Court's prior ruling); *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965)(granting certiorari to determine whether rationale of previous decision should be carried over to Labor Management Relations Act); *Oregon v. Mathiason*, 429 U.S. 492, 493 (1977)(granting certiorari to correct application of prior decision); and *Hankerson v. North Carolina*, 432 U.S. 233, 240 (1977)(granting certiorari to determine retroactivity of prior decision).

backed by powerful, local institutions and interests.[53] This situation is likely to repeat itself throughout the country as state after state undertakes the deregulation of its utility industries. Moreover, it presents a decision below that is wrongly decided without an adequate and independent basis under state law to sustain the result.[54] Finally, petitioner is unable to obtain further state adjudication absent this Court's judicial intervention.[55]

THE DECISION BELOW IS ERRONEOUS

A. Because the final order essentially negates the economic value of the contract, the impairment of the contract is substantial and unconstitutional.

The BPU cited two provisions in the Contract that it claimed permitted the imposition of stranded cost charges. Neither can support that claim.

The first of these provides that if *PSE&G* "incurs any taxes, assessments of or other charges in connection with the services," provided under the agreement which were not applicable at the time of entering into the agreement, "such taxes, assessments or other charges shall be passed through to

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[53] *See, e.g., Wolff v. McDonnell*, 418 U.S. 539, 542 (1974)(granting certiorari to resolve important question regarding administration of a state prison); *Rhodes v. Chapman*, 452 U.S. 337, 344 (1981)(same); *Youngberg v. Romeo*, 457 U.S. 307, 314 (1982)(granting certiorari to resolve an important question concerning the administration of state institutions for the mentally retarded).

[54] *See Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 98, *reh. denied*, 303 U.S. 667 (1938)(noting that where a state court does not decide a case upon an independent state ground, but deeming a federal question to be before it, actually entertains and decides the question adversely to the federal right asserted, the Supreme Court has jurisdiction to review the judgment, if final).

[55] *Lucas*, 505 U.S. at 1012 [observing petitioner "would plainly be unable (absent our intervention now) to obtain further state-court adjudication . . . ."].

[Co-Steel] Raritan *as an increase in PSE&G's costs of providing service* hereunder."[56] The stranded cost charges here at issue are not, however, *increased costs incurred by PSE&G* after entering the agreement at all; they are, rather, accelerated revenues that PSE&G has been authorized to collect for investments made *before* entering into the agreement. Unlike the kind of 'increase in PSE&G's costs' contemplated by this provision in the Contract, the moneys collected from Co-Steel as 'stranded costs' are not paid by PSE&G to a third party, they are pocketed by PSE&G for the benefit of its shareholders.

The other language upon which the BPU relied was a provision that made the Contract "subject to present and future local, state and federal laws and to the regulations or orders of any local, state or federal regulatory authority having jurisdiction over the matters set forth herein."[57] This language does nothing more than acknowledge the state legislature's inalienable authority to regulate utility services and charges. As this Court noted long ago,

> the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community . . . can neither be abdicated nor bargained away, and is inalienable even by express grant; and . . . all contract and property [or other vested] rights are held subject to its fair exercise.[58]

The Contract, therefore, could just as well have been silent on the subject. The state's authority to subsequently modify the Contract would not have been affected in the least. But that does not mean that the state's exercise of that power is unlimited. As the quotation above makes clear, the exercise

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[56] App., *infra*, 427a (emphasis added).

[57] App. *infra*, 429a.

[58] *Atlantic Coast Line R.R. Co. v. Goldsboro*, 232 U.S. 548, 558 (1914).

of that power must be reasonable. Whether it acts pursuant to its sovereign power or under this clause of the Contract, the state cannot do whatever it chooses. It cannot take property without just compensation and it cannot so diminish the value of a contract as to impair it. Were it otherwise, there could never be a case in which a state public utility authority could be found to have unconstitutionally impaired a contract. Yet such cases do exist.[59]

In a further attempt to justify its decision, the BPU asserted that the Contract cannot have been impaired because "Co-Steel will be receiving power at a net price lower than that originally bargained for . . . ."[60] That is, of course, irrelevant if the legislature intended an even greater increase, but it is also wrong. It ignores the undisputed testimony of the Co-Steel witnesses who testified, without contradiction, on the negative financial impact of the stranded cost charges on Co-Steel as well as a rate increase that occurred after April 30, 1997, the date on which the Deregulation Act's mandated reductions are to be based.[61]

As the Contract itself and record evidence demonstrates, price was a crucial element in the Contract, and it is untenable

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[59] *See*, e.g., *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978); *Minnesota Ass'n of Health Care Facilities, Inc. v. Minnesota Dept. of Public Welfare*, 742 F.2d 442 (8th Cir. 1984); *Bunker Hill Co. v. Washington Water Power Co.*, 561 P.2d 391 (Idaho 1977); *Agricultural Products Corp. v. Utah Power & Light Co.*, 557 P.2d 617 (Idaho 1976).

[60] App., *infra*, 334a.

[61] On April 1, 1998, the BPU approved an increase in PSE&G's demand-side management charges. *In re Public Service Electric & Gas Co.*, BPU Docket No. ER97020101 (April 1, 1998). This resulted in a 3.9% increase in rates for the average PSE&G customer, who, therefore, is better off after the Act's rate reductions. But for Co-Steel, the increase resulting from this decision was over 9%, or $1.8 million. Neither a 5% nor 10% reduction on only one-third of Co-Steel's load cannot yield savings greater than a 9% increase applied to its total load.

to suggest that unexpectedly tacking on 'stranded cost' surcharges in an amount equal to the rate reduction for which Co-Steel bargained and gave substantial consideration does not constitute a substantial contract impairment. The price provisions in the Contract were integral to its execution, to the retention of Co-Steel as a customer in New Jersey, and Co-Steel's increasing its investment in the State. Co-Steel would never have signed the Contract if these stranded cost charges had been included.[62] And if Co-Steel would not have signed the Contract with these charges in it, it is patently absurd to suggest that the Contract is not impaired when these charges are added to the Contract after Co-Steel signed it.

Like the BPU, the superior court both ignored the administrative record and substituted its views for the uncontradicted evidence in the record. On several key points relating to whether any contract impairment occurred, the court drew unwarranted and incorrect inferences from facts in the record that were undisputed.

In affirming every aspect of the BPU's decisions, the courts below gave, and acknowledged they were giving, deference to the BPU's. But no such deference is required in connection with an agency's interpretation of case law or legal conclusions[63] and none is warranted when the decision conflicts with express or implied legislative intent[64] or to interpretations not dependent on the BPU's special expertise.[65]

No one would question that, absent the stranded cost provisions of the Deregulation Act or the BPU's decision, PSE&G would not be at liberty unilaterally to impose a post-

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[62] App., *infra*, 409a.

[63] *E.g., Mayflower Security Co. v. Bureau of Securities*, 64 N.J. 85, 93 (1973).

[64] *E.g., P.F. ex rel. B.F. v. New Jersey Div. Of Dev. Disabilities*, 139 N.J. 522, 529 (1995).

[65] *E.g., Close v. Kordulak Bros.*, 44 N.J., 589, 599 (1965).

contract surcharge on Co-Steel. It is axiomatic that a seller signing a contract at a set price may not, after the Contract ends, collect a surcharge to cover additional costs incurred before or during the Contract. The action of the state allows PSE&G to do what it could not otherwise have done: impose a post-contract surcharge without the consent of the other party.

In *Allied Structural Steel Co. v. Spannaus*, the Court wrote:

> [the] severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.[66]

It is hard to imagine a greater impairment than one that negates the economic value of a contract. Yet electric industry deregulation could just as effectively been carried out *without* impairing the Contract; a factor that is particularly significant given the fact that the New Jersey Attorney General approved the contract before it was approved by the BPU.[67] Since the Deregulation Act substantially and needlessly impairs the Contract, the state action here violates the contract impairment clause.

B. If the BPU is correct that the Deregulation Act requires the assessment of stranded costs, then excluding Co-Steel from the full rate reductions mandated by the Act deprives Co-Steel the equal protection of the law.

Co-Steel did not assert any right to the rate reduction mandated by the Act until after the BPU ruled that the Act

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[66] 438 U.S. at 245 (footnote omitted).

[67] *See Nieves v. Hess Oil Virgin Islands Corp.*, 819 F.2d 1237, 1243 (3rd Cir. 1987), *citing United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 25-26 and 30-32 (1977).

required the assessment of stranded cost charges despite the Contract, but that the Contract precluded Co-Steel from receiving the full rate reduction mandated by the Act. If the BPU is correct that the Deregulation Act requires the assessment of stranded costs, then excluding Co-Steel from the full rate reduction mandated by the Act deprives Co-Steel the equal protection of the law.

Section 4(d)(1) of the Deregulation Act states in clear, unequivocal terms that:

> During a term to be fixed by the board, each public utility shall reduce its aggregate level of rates *for each customer class*, including any surcharges assessed pursuant to this act, by a percentage to be approved by the board, which shall be at least 10 percent relative to the aggregate level of bundled rates in effect as of April 30, 1997, subject to the provisions of Paragraph (2) of this subsection.

(Emphasis added). There is no room in this language for interpretation or assumptions about its meaning or the exercise of administrative discretion.[68] Yet, in deciding that the provision did not apply to Co-Steel's Block 2 purchases, the BPU opined that it was "much more reasonable" to assume "customer class" referred only to customers served under fixed tariffs. The BPU did not explain why the legislature might have concluded that there were customers who were not part of a "customer class" or why the EHEP tariff was legally any less of a "fixed tariff" than all of the others.

By applying its own view of what was reasonable, the BPU not only deviated from the express language of the Deregulation Act and the well understood meaning of the

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[68] *See*, e.g., *B.F., ex rel*, 139 N.J. at 529 (1995).

term within the industry,[69] it created two classes of New Jersey ratepayers: those who take service under a fixed tariff;

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[69] The Deregulation Act itself nowhere defines the term "customer class," but it is a term long-established and well-understood in utility ratemaking. Co-Steel takes its contract service under PSE&G's EHEP tariff, which appears as Sheet No. 85 in PSE&G's published tariffs. The customers taking under the EHEP tariff constitute a separate customer class as that term is normally understood (and if Co-Steel currently is the only such customer, then it is a class by itself). The BPU's regulations do not directly define "customer class," but N.J.A.C. 14:4-2.4, which requires an applicant for an electric power supplier license to specify the number of customers and sales volume "by customer class," contains two separate references to "customer class" and each is immediately followed by the parenthetical "(i.e. utility specific rate schedule)." This confirms that all customers are, and all consumption occurs, as part of a class. The EHEP tariff is a utility specific rate schedule and EHEP customers are a class.

Indeed, the FERC Form 1 which PSE&G was required for file for the year ended December 31, 1998, lists, on page 304.1, PSE&G's various rate schedules in effect during the year and the number of customers, kilowatt-hours, etc., for each. The EHEP tariff is listed there as one of the schedules and is shown to be applicable to just one customer who consumed during the year 482,805,000 kwh — the sum of Co-Steel's Block 1 and 2 usage. This too shows that PSE&G normally considers Co-Steel, and all its consumption, to constitute a separate customer class.

The meaning of the term "customer class" as including *all* utility customers is so widely understood and accepted that research reveals few decided cases expressly addressing the issue. However, customers taking service under a special contract rate schedule routinely are deemed by utility regulators in other jurisdictions to comprise a customer class unto themselves. *See, e.g., Central Illinois Light Co.*, 1999 Ill. PUC Lexis 649 (Aug. 25, 1999) (Rate 32 Contract Service listed as a customer class); *Entergy Louisiana*, 1999 La. PUC LEXIS 42 (May 26, 1999) (Special Contract Rate Customers are a customer class); *Detroit Edison Co.*, 1998 Mich. PSC LEXIS 355 (Dec. 28, 1998) (special contract customers one of Detroit Edison's customer classes); *Laclede Gas Co.'s PGA Rate Design*, 1995 Mo. PSC LEXIS 30 (Aug. 22, 1995) (special contract customers are a class).

to whom Section 4(d)(1) is then deemed to apply, and those who take service under non- fixed tariffs, to whom the BPU determined it does not. Conveniently, Co-Steel not only falls — but is the *only* customer in the entire State of New Jersey that falls — into the latter class, a class of one.

The fact that it was the BPU and not the legislature that drew this distinction is significant. For "[l]egislatures are presumed to have acted constitutionally."[70] In extending unwarranted deference to the BPU's interpretation of the statute, the courts below turned this presumption on its head and needlessly created a constitutional issue that could and should have been resolved solely on the basis of the statute.

The BPU's sole attempt to provide a rational basis for the distinction it drew between Co-Steel's tariff and those applicable to everybody else was based upon the fact that Co-Steel's Block 2 purchases are based on market prices. This is true. But that does not mean that the statutory rate reduction should not apply. Once again, if any assumption is justified, it is the assumption that the legislature was aware of all of the PSE&G's published tariffs. And, if any inference is justified, it is that by not excluding the EHEP tariff from Section 4(d), the legislature meant it to be included. There is simply no authority, other than the BPU's preference, for the result to be otherwise.

The position the BPU takes in the Final Order is untenable, for it leaves Co-Steel's Block 2 consumption as not part of *any* customer class — apparently just floating classlessly in no-man's-land. That cannot be correct. For purposes of section 4(d) of the Deregulation Act, Co-Steel properly must be viewed as part of the EHEP customer class, its total consumption under that tariff must be deemed the consumption of that class, and the statutory percentage rate reductions must be applied to the total consumption of that

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[70] *McDonald v. Board of Election Comm'rs.*, 394 U.S. 802, 809 (1969).

class, as the language of the Deregulation Act requires. Any other conclusion would single out Co-Steel, alone among all customer classes, and arbitrarily deny it without rational reason the same level of benefits accorded all other classes, resulting in a denial to Co-Steel of the equal protection of the laws.[71]

C. The "unusual procedural irregularities" of the BPU deprived all parties of due process.

What due process of law is required, depends, of course, upon the circumstances. However, this much is clear, "where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."[72] Furthermore, "the decisionmaker's conclusion . . . must rest solely on the legal rules and evidence adduced at the hearing . . . [and] . . . [t]o demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on . . . ."[73] Finally, an agency's failure to articulate its rationale cannot be saved by *post hoc* rationalization.[74]

Petitioner recognizes the need to implement restructuring on a timley basis. After the passage of the Deregulation Act, however, the BPU and the courts of New Jersey clearly got swept away in the perceived urgency utility restructuring and foresook legality and utility restoring in the interest of expediency in a manner that violates every notion of fundamental fairness.

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[71] *See, e.g., Smith v. Cahoon*, 283 U.S. 553 (1931); *F.S. Royster Guano v. Virginia*, 253 U.S. 412, 415 (1920).

[72] *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).

[73] 397 U.S. at 271. *See also Atchison, Topeka & Santa Fe Rwy Co. v. Wichita Board of Trade*, 412 U.S. 800, 805-6 (1973).

[74] *E.g., Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insur. Co.*, 463 U.S. 29, 50 (1983); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

Philip L. Chabot, Jr.
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March 6, 2001

Supreme Court, U.S.
FILED
001393 MAR - 6 2001
OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 2000

CO-STEEL RARITAN

Petitioner,

v.

NEW JERSEY BOARD OF PUBLIC UTILITIES

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of the State of New Jersey

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI VOLUME I

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SUPREME COURT OF NEW JERSEY
A-139/140/147 September Term 1999
49, 690

IN THE MATTER OF
PUBLIC SERVICE ELECTRIC AND
GAS COMPANY'S RATE UNBUNDLING,
STRANDED COSTS, AND RESTRUCTURING
FILINGS

ORDER

DEC 06 2000

IN THE MATTER OF
THE PETITION OF PUBLIC SERVICE
ELECTRIC AND GAS COMPANY FOR A
BONDABLE STRANDED COST RATE ORDER
IN ACCORDANCE WITH CHAPTER 23 OF
THE LAWS OF 1999, etc.

The Supreme Court having carefully considered the record, the briefs of the parties and amici curiae, and the argument of counsel,

And the Court having determined that it is in the public interest to expedite the disposition of the within appeals;

And good cause appearing;

IT IS ORDERED that the judgment of the Appellate Division is affirmed. The opinions of the Court will be filed in due course.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 6th day of December, 2000.

/s/_____
Clerk of the Supreme Court

SUPREME COURT OF NEW JERSEY

No. A-139/140/147 SEPTEMBER TERM 1999

ON APPEAL FROM _____

ON CERTIFICATION TO Appellate Division, Superior Court

IN THE MATTER OF
PUBLIC SERVICE ELECTRIC AND
GAS COMPANY'S RATE UNBUNDLING,
STRANDED COSTS, AND RESTRUCTURING
FILINGS

IN THE MATTER OF
THE PETITION OF PUBLIC SERVICE
ELECTRIC AND GAS COMPANY FOR A
BONDABLE STRANDED COST RATE ORDER
IN ACCORDANCE WITH CHAPTER 23 OF
THE LAWS OF 1999, etc.

DECIDED December 6, 2000

Chief Justice Poritz PRESIDING

CHECKLIST	Affirm	Reverse in Part	
Chief Justice Poritz	X		
Justice Stein		X	
Justice Coleman	X		
Justice Long	X		
Justice Verniero	X		
Justice LaVecchia	____	____	
Justice Zazzali	____	____	
TOTALS	4	1	

SUPREME COURT OF NEW JERSEY

STEPHEN W. TOWNSEND
CLERK

GAIL GRUNDITZ HANEY
DEPUTY CLERK

OFFICE OF THE CLERK
PO BOX 970
TRENTON, NEW JERSEY 08625-0970

DATE: December 6, 2000

TO: All Counsel

FROM: Stephen W. Townsend, Esq.

RE: A-139/140/147-99 IMO Public Service Electric and Gas Company, etc.

I enclose a copy of the Supreme Court Order in the above matter, which is being filed. Please take whatever action is appropriate in light of the Court's ruling.

Thank you.

/s/ Stephen Townsend

SWT/pgw

Enclosure

SUPREME COURT OF NEW JERSEY
A-147 September Term 1999
49,690

IN THE MATTER OF PUBLIC SERVICE ELECTRIC AND GAS COMPANY'S RATE UNBUNDLING, STRANDED COSTS AND RESTRUCTURING FILINGS,

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ORDER
FILED
JUL 20 2000

IN THE MATTER OF THE PETITION OF PUBLIC SERVICE ELECTRIC AND GAS COMPANY FOR A BONDABLE STRANDED COST RATE ORDER IN ACCORDANCE WITH CHAPTER 23 OF THE LAWS 1999, ETC.

The Court having treated the claimed appeal as of right by Co-Steel Raritan as a petition for certification and having granted the petition, in part (See Order in C-1413-99),

And the Court having determined that the parties should file briefs that address the following issues, which briefs are to include counsels' explanation of the economic effect of the BPU's disposition of the enumerated issues and the economic impact that would result from the adoption of the position advocated by Co-Steel Raritan in respect of those issues;

1. Whether the rate reduction mandated by Electric Discount and Energy Competition Act of 1999 (EDECA), N.J.S.A. 48:3-49 to -98, should be applied to all of Co-Steel's usage and not just block 1 HTS usage;

2. Whether Co-Steel is entitled to a 10% reduction from its April 30, 1997, rates rather than a 13.9% reduction

from current rates by August 1, 2002, as ordered by the BPU; and

3. Whether the 1999 rate reduction should be 5% from 1997 rates rather than 5% from the 1999 rates;

And good cause appearing;

IT IS ORDERED that appellant Co-Steel Raritan shall serve and file nine copies of its brief addressing the foregoing issues within thirty days of the filling date of this Order; and it is further

ORDERED that the BPU, the Ratepayer Advocate, and Public Service Electric & Gas shall serve and file responding briefs within thirty days thereafter; and it is further

ORDERED that appellant shall serve and file a reply brief within ten days of the filing of the final respondent's brief; and it is further

ORDERED that the Clerk shall set this matter down for oral argument on Wednesday, November 8, 2000, at 10:00 a.m. in the Supreme Court courtroom, Hughes Justice Complex, Trenton.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 20th day of July, 2000.

/s/ Stephen Townsend
Clerk of the Supreme Court

SUPREME COURT OF NEW JERSEY
A-139/140 September Term 1999
49,690

IN THE MATTER OF PUBLIC SERVICE ELECTRIC AND GAS COMPANY'S RATE UNBUNDLING, STRANDED COSTS AND RESTRUCTURING FILINGS,

---

ORDER
FILED
JUL 20 2000

IN THE MATTER OF THE PETITION OF PUBLIC SERVICE ELECTRIC AND GAS COMPANY FOR A BONDABLE STRANDED COST RATE ORDER IN ACCORDANCE WITH CHAPTER 23 OF THE LAWS 1999, ETC.

The Court having granted the petition for Certification filed in the within matter (C-1263-99 and C-1295-99), and the Court having determined that the parties should submit supplemental briefs limited to the following issues, which briefs are to include counsels' explanation of the economic effect of the BPU's disposition of the enumerated issues and the economic impact that would result from the adoption of the position advocated by the Ratepayer Advocate in respect of those issues,

And good cause appearing;

IT IS ORDERED that the parties shall serve and file nine copies of a supplemental brief addressing the following issues, using the specificity of the pertinent point headings and subheadings of the Appellate Division brief of the Division of Ratepayer Advocate as the complete statement of the issues to be covered:

1. Pursuant to the Electric Discount and Energy Restructuring Act, PSE&G's August 1, 1999, rate reduction had to be 5% from April 1997 rate, not from current rates. Thus, the Board's order violates the rate reduction provisions of the Electric Discount and Energy Restructuring Act and must be reversed [Point III];

2. The Board's approval of the use of deferred accounting for PSE&G to achieve the statutory rate reductions violates the Electric Discount and Energy Restructuring Act, which requires rate reductions, not rate deferrals [Point IV];

3. The BPU improperly allowed PSE&G to use the excess electric depreciation reserve funds to achieve rate reductions mandated by the Act [Point V];

4. There was an insufficient evidentiary record developed on the issue of PSE&G's proposed formation of an unregulated affiliate (Genco) and the valuation of the property to be transferred; thus, the Board's order approving the formation of Genco and immediate asset transfer must be reversed because it is arbitrary and capricious, and is not based on credible evidence in the record.

A. The Board's decision on the value of the transferred facilities deprives customers of the appropriate valuation and results in PSE&G'S recovering more stranded costs that it is entitled to, to the detriment of its customers; moreover, the Board based its decision on the Company's owned-generation stranded costs on an out-of-record document .

B. The valuation of the generating assets the BPU approved for the transfer to the genco is inconsistent with the value it approved for the purposes of - calculating stranded costs .

C. The Board failed to properly value all of PSE&G's generating assets, such as fuel contracts, when calculating PSE&G's stranded coats.

D. The Board's unlawful waiver of its Administrative Regulations governing Utility Asset Transfers must be reversed. [Point VII]

5. The Board's failure to conduct hearings in the securitization case violates the New Jersey Administrative Procedure Act, the Restructuring Act, and administrative due process .

A. Because the Securitization case had a direct impact on PSE&G's restructuring cases, including stranded costs recovery and rate reductions, the Board was required to hold a hearing.

B. The Board's adoption of two major revisions to PSE&G's financing petition, without providing the Ratepayer Advocate an opportunity to respond, is contrary to administrative. due process and must be reversed. [[Point VII]

6. The Board's Order fails to require PSE&G to pass through all the cost savings from securitization, as required by the Electric Discount and Energy Restructuring Act.

A. The Board failed to pass through to ratepayers the entire amount of savings due to securitization over its 15 year term. [Point VIII]

and it is further

ORDERED that appellants shall serve and file their briefs within thirty days of the filing date of this Order and respondents shall respond within thirty days thereafter; and it is further

ORDERED that the Clerk shall set this matter down for oral arguments on Wednesday, November 8, 2000, at 10:00 a.m. in the Supreme Court courtroom, Hughes Justice Complex, Trenton.

WITNESS, the Honorable Deborah T, Poritz, Chief Justice, at Trenton, this 20th day of July, 2000.

/s/ Stephen Townsend
Clerk of the Supreme Court

SUPREME COURT OF NEW JERSEY
A-139/140 September Term 1999
49,690

IN THE MATTER OF PUBLIC SERVICE ELECTRIC AND GAS COMPANY'S RATE UNBUNDLING, STRANDED COSTS AND RESTRUCTURING FILINGS,

---

ORDER
FILED
JUL 14 2000

IN THE MATTER OF THE PETITION OF PUBLIC SERVICE ELECTRIC AND GAS COMPANY FOR A BONDABLE STRANDED COST RATE ORDER IN ACCORDANCE WITH CHAPTER 23 OF THE LAWS 1999, ETC.

This matter having been presented to the Court by the filing of a notice of appeal by Co-Steel Raritan from the Appellate Division's consolidated judgment in A-643-99T3, A-772-99T3, A-1050-99T3, and A-1108-99T3, and the Court having determined that the appeal does not raise a substantial constitutional question in accordance with R. 2:2-1(a)(1) and the case law interpreting that provision, and the Court, on its own motion, having determined to review the appeal under the standards applicable to a petition for certification;

It is ORDERED that the petition for certification (C-1413-99) is granted, limited to the issues concerning rate reductions and denied as to all other issues raised, including claims of impairment of contract, and it is further;

ORDERED that the motions of Public Service Electric and Gas Company to dismiss (M-1387-99) and for summary affirmance (M-1388-99) are dismissed as moot.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 13th day of July, 2000.

/s/ Stephen Townsend
CLERK OF THE SUPREME COURT

SUPREME COURT OF NEW JERSEY
A-139/140 September Term 1999
49,690

IN THE MATTER OF PUBLIC SERVICE ELECTRIC AND GAS COMPANY'S RATE UNBUNDLING, STRANDED COSTS AND RESTRUCTURING FILINGS,

---

ORDER
FILED
JUL 14 2000

IN THE MATTER OF THE PETITION OF PUBLIC SERVICE ELECTRIC AND GAS COMPANY FOR A BONDABLE STRANDED COST RATE ORDER IN ACCORDANCE WITH CHAPTER 23 OF THE LAWS 1999, ETC.

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-643-99T3, A-772-99T3, A-1050-99T3, and A-1108-99T3 having been submitted to this Court by the New Jersey Ratepayer Advocate, and the Court having considered the same;

It is ORDERED that the petition for certification is granted.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 13th day of July, 2000.

/s/ Stephen Townsend
CLERK OF THE SUPREME COURT

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-643-99T3
A-772-99T3
A-1050-99T3
A-1108-99T3

IN THE MATTER OF PUBLIC SERVICE ELECTRIC AND GAS COMPANY'S RATE UNBUNDLING, STRANDED COSTS AND RESTRUCTURING FILINGS,

---

APPROVED FOR PUBLICATION
APR 13 2000
APPELLATE DIVISION

IN THE MATTER OF THE PETITION OF PUBLIC SERVICE ELECTRIC AND GAS COMPANY FOR A BONDABLE STRANDED COST RATE ORDER IN ACCORDANCE WITH CHAPTER 23 OF THE LAWS 1999, ETC.

Argued: March 8, 2000 - Decided:

Before Judges King, Carchman and Lefelt.

On appeal from the New Jersey Board of Public Utilities.

Phyllis J. Kessler argued the cause for appellant New Jersey Business Users in A-643-99T3 and A-1050-99T3 (Kudman, Trachten, Kessler, Tacopina & Newman, attorneys; Ms. Kessler, on the brief).

Philip L. Chabot, Jr. (Wilkinson Barker Knauer) of the Washington, D.C. bar, admitted pro hac vice, argued the

cause for appellant Co-Steel Raritan in A-772-99T3 and A-1108-99T3 (Windels, Marx, Davies & Ives, and Mr. Chabot, Foster DeReitzes and Sandra E. Rizzo, attorneys; Anthony R. Coscia and Amanda F. Shechter, of counsel and on the brief).

John A. Hoffman argued the cause for respondent PSE&G (Wilentz, Goldman & Spitzer, and Francis E. Delany, Jr., and Roger L. Camacho, Corporate Rate Counsel, attorneys; James T. Foran, Anne S. Babineau and Matthew James T. Foran, Anne S. Babineau and Matthew M. Weissman, of counsel and on the brief).

Gregory Eisenstark argued the cause for respondent Division of the Ratepayer Advocate (Blossom A. Peretz, Ratepayer Advocate, attorney; Ms. Peretz, Mr. Eisenstark and Nusha Wyner, Deputy Ratepayer Advocate, and Kurt Lewandowski, Assistant Deputy Ratepayer Advocate, on the brief).

Helene S. Wallenstein, Senior Deputy Attorney General, argued the cause for respondent New Jersey Board of Public Utilities (John J. Farmer, Jr., Attorney General of New Jersey, attorney; Andrea M. Silkowitz, Assistant Attorney General, of counsel; Ms. Wallenstein and James Eric Andrews, Deputy Attorney General, on the brief).

James E. McGuire argued the cause for respondent New Jersey Commercial Users in A-643-99T3 (Reed, Smith, Shaw & McClay, attorneys; Mr. McGuire, on the brief).

Gerald W. Conway argued the cause for respondent Jersey Central Power & Light in A-643-99T3 (Berlack, Israels & Liberman, attorneys; Mr. Conway and Marc B. Lasky, of counsel; Pauline Foley and Amy P.K. Motzenbecker, on the brief).

William Harla argued the cause for respondent Independent Energy Producers of N.J. in A-643-99T3

(DeCotiis, Fitzpatrick & Gluck, attorneys; Mr. Harla, on the brief).

Michael J. Mehr argued the cause for respondent Tosco Refining in A-643-99T3 (Waters, McPherson & McNeill, attorneys; Mr. Mehr, on the brief).

LeBoeuf, Lamb, Greene and MacRae, attorneys for respondent Atlantic City Electric Company in A-643-99T3 (Stephen B. Genzer and Mark L. Mucci, of counsel).

Courter, Kobert, Laufer & Cohen, attorneys for respondent Enron Energy Services, Inc. in A-643-99T3 (Murray E. Bevan, of counsel; Richard P. DeAngelis, Jr., on the brief).

Riker, Danzig, Scherer, Hyland & Perretti, attorneys for respondent Rockland Electric in A-643-99T3 (Vincent Sharkey and James C. Meyer, of counsel and on the brief).

McManimon & Scotland, attorneys for respondent Cogen Technologies in A-643-99T3 (John B. Hall, on the brief).

Hagley, Aronchick, Sepal & Pudlin, attorneys for respondent New Energy Ventures in A-643-99T3 (John P. Lavelli, Jr., on the brief).

Potter & Dickson, attorneys for respondent General Motors in A-643-99T3 (R. William Potter and Peter D. Dickson, of counsel).

Cozen & O'Connor, attorneys for respondent South Jersey Gas Co. in A-643-99T3.

Kudman, Trachten, Kessler, Tacopina & Newman, attorneys for respondent New Jersey Business Users in A-1108-99T3 (Phyllis J. Kessler, on the brief).

The opinion of the court was delivered by

KING, P.J.A.D.

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TABLE OF ACRONYMS

BGS	Basic Generation Service
BSCRO	Bondable Stranded Cost Rate Order
EHEP	Experimental Hourly Energy Pricing tariff
HTS	High Tension Service
LEAC	Levelized Energy Adjustment Clause
MTC	Market Transition Charge
NTC	Nonutility Generator Transition Charge
NUG	Nonutility generator
PJM	Pennsylvania-New Jersey-Maryland power pool
SBC	Societal Benefits Charge
TBC	Transition Bond Charge

I

INTRODUCTION

This is a consolidated appeal from two decisions of respondent the Board of Public Utilities (BPU): (1) its Final Decision and Order on the rate unbundling, stranded costs, and restructuring filings of respondent Public Service Electric and Gas Company (PSE&G), and (2) its bondable stranded cost rate order (BSCRO) on PSE&G's petition to finance, or securitize, its recovery-eligible stranded costs-

Co-Steel Raritan (Co-Steel), one of PSE&G's largest commercial customers, appeals from that portion of the Final Decision which ordered payment of stranded cost charges mandated by the Electric Discount and Energy Competition Act of 1999, N.J.S.A. 48:3-49 to - 98, L. 1999, c. 23, effective February 9, 1999 (the Act), despite Co-Steel's special contract with PSE&G. The Division of the Ratepayer Advocate (RA) and New Jersey Business Users (NJBUS), a group of large

industrial and commercial customers, appeal from specific findings in the Final Decision and on procedural due process grounds, contending that they were denied due process when the BPU refused to reopen the record after passage of the Act and BPU decided the securitization issue without holding hearings, among other procedural irregularities. The RA is also a respondent on the issues raised by Co-Steel. Briefs have been filed on behalf of six intervenors in the proceedings before the agency: Jersey Central Power & Light Company (GPU), Rockland Electric Company (RECO), New Jersey Commercial Users (NJCU), Enron Energy Services (Enron), Independent Energy Producers of New Jersey (IEPNJ), and Tosco Refinery Company (Tosco).

The administrative proceedings leading up to these decisions were unusual in many ways: hearings on the unbundling, stranded costs, and restructuring issues were held before an administrative law judge before the Act was passed; the securitization issue invited comments from interested parties but no hearings. Quasi-legislative public hearings were held on deregulation three years before the Act actually was introduced in the Legislature. The BPU's Final Decision relied heavily on a negotiated agreement between PSE&G and seven intervenors which had an opportunity to comment on the agreement. Despite the unusual procedural irregularities, however, we conclude that all parties had ample opportunity to be heard on all aspects of both decisions. We find no denial of due process and no fundamental unfairness. We affirm.

To assist the reader in understanding the terms and acronyms we use we provide a Table of Acronyms.

II

THE HISTORY

From the early 1900s until the Act was passed in 1999, the electric power industry had been composed of vertically-integrated public utility companies. Each company owned

power generation plants, plus transmission, distribution, and customer service facilities. The companies had virtual monopolies over their geographically-defined service territories. The charges for all services—power supply, electric transmission and distribution, and such customer services as connects and disconnects, metering, billing, and account administration—were "bundled" and billed at a single price.

In the late 1970s, electricity rates increased dramatically; by 1985 New Jersey consumers were paying about 50% above the national average for electricity. This situation persisted into the late 1990s. Although such factors as a higher cost of living, higher energy taxes, tighter environmental standards, and a lack of indigenous energy supplies played a part in this rise in rates, a major factor was the high average power production costs in New Jersey. Power production costs were high due to expensive utility-owned nuclear power plants and expensive power purchase agreements with nonutility generators (NUGs).

Competition began in the production aspect of the electric power industry after Congress enacted the Public Utility Regulatory Policies Act of 1978, 16 U.S.C.A. § 2601-2645 (PURPA), which provided incentives to develop nonutility electricity generation. Because of various federal initiatives, by 1997 there were a growing number of power producers and suppliers offering power for sale regionally at competitive prices. In fact, 19% of the electricity consumed by New Jersey customers in 1997 was purchased from independent power producers.

New Jersey's move toward competitive electric power markets in the 1990s paralleled similar regional and national developments. David Pettinari, You Can't Always Get What You Want--Will Two Recent State Court Decisions Tarnish the Political Promise of Electricity Industry Deregulation?, 76 U. Det. Mercy L. Rev. 501, 519 (1999). In 1992 Congress enacted the Energy Policy Act, 42 U.S.C.A. §§ 13201-556, which supported competition and choice in the electricity

marketplace, and in May 1995 the Federal Energy Regulatory Commission adopted rules which paved the way for a competitive wholesale power market. Pennsylvania, New York, Massachusetts, New Hampshire, Rhode Island, Vermont, Maine, and California passed legislation or announced plans that would initiate retail choice for electric customers during 1998 and 1999. Michigan introduced deregulation through an administrative order before legislation on the matter was adopted. Pettinari, at 529-30.

In March 1995, the New Jersey Energy Master Plan Committee, under the leadership of Governor Whitman and Herbert Tate, president of the BPU, released the New Jersey Energy Master Plan Phase I Report, which provided a policy framework for the transition from power industry monopolies to competitive markets. The Master Plan recommended several short-term measures to prepare for the transition to competition, including passage of legislation providing for rate flexibility to help retain Hat risk" customers, and it directed the BPU to investigate changes to the structure of the electric power industry as a means of lowering the cost of electricity in this State. In July 1995, Governor Whitman signed into law P.L. 1995, c. 180, the Rate Flex and Alternative Regulation Act, N.J.S.A. 48:2-21.24 to -30, which mandated that the BPU implement programs which promote a transition to a market-based competitive environment in the energy industry. For example, the Rate Flex Act allowed electric utilities to enter into "off-tariff" or discounted rate agreements with business customers in order to induce them to remain in New Jersey.

By an order of June 1, 1995 the BPU initiated Phase II proceedings to investigate and develop a long-term policy for implementing a competitive marketplace for electricity. The order directed interested parties to participate through comments and reply comments to the BPU between July and October 1995. Four informal working groups composed of representatives of various interest groups and stakeholders were formed to explore the issues related to restructuring the

electric industry. They submitted reports to the BPU in February 1996. The BPU staff prepared a status report based on the four working-group reports and by an order of June 27, 1996 the BPU adopted the status report's recommendations regarding the procedural steps necessary to move toward restructuring.

The BPU adopted a two-step approach to gathering additional information: (1) it ordered formal public hearings and a concurrent public comment period for written comments, and (2) it ordered informal negotiating sessions with representatives of the various interest groups in an attempt to reach a consensus on the salient issues. The status report was distributed for public comment, and public, legislative-type hearings were conducted on July 18, 1996, in Trenton; on July 30, 1996, in Atlantic City; and on August 7 and 8, 1996, in Newark. Written comments were received by August 16, 1996.

In June 1996, negotiating teams were formed; they included representatives from all stakeholders and interest groups: the four New Jersey utilities -- PSE&G, RECO, GPU, and Atlantic Electric Company (Atlantic); consumer groups; environmental interests; energy service companies; independent power producers; power marketers (nonutility companies that buy and then resell electricity); industrial, business, and commercial customers; independent contractors; labor unions in the electric industry; public power associations; local government, and the Director of the RA. The interest groups were permitted to have technical advisers help with the negotiating. Negotiating sessions occurred on a weekly basis from June 27, 1996 through October 25, 1996.

On January 16, 1997 the BPU released "Restructuring the Electric Power industry in New Jersey: Phase II Report Proceeding Proposed Findings and Recommendations Report" (draft report). Three public hearings to receive oral comments on the draft report were held on February 4, 1997, in Newark; on February 5, 1997, in Camden County; and on February 11, 1997, in Trenton. The BPU heard testimony

from forty-two parties and accepted written comments from thirty-nine parties through February 28, 1997. After review of the comments and testimony, the BPU prepared "Restructuring the Electric Power Industry in New Jersey: Findings and Recommendations (Final Report)," which was adopted and released by an order dated April 30, 1997.

The 173-page Final Report's primary recommendation was that by October 1998 retail electric customers in New Jersey should commence to have the ability to choose their electric power supplier, and by July 2000 all New Jersey retail customers should be able to exercise that choice. The Final Report also recommended rate reductions of 5 to 10% while retail competition was phased in. The BPU announced it was looking "forward to working with the State's legislators during 1997 to craft legislation which will provide the foundation and necessary legal authority for the changes" it recommended.

The BPU's April 30, 1997 order adopting the Final Report also directed the four utility monopolies in New Jersey to submit filings in accordance with the guidelines and principles in the Final Report. The Final Report's "Implementation Steps and Schedule" directed each of the four companies to submit three filings—a rate unbundling petition, a stranded cost petition, and a restructuring plan—by July 15, 1997. The BPU expected that several of the issues to be addressed in the filings—standards for fair competition, affiliate relationship standards, analysis of market power, and mechanics for the phase-in of customer choice—would be "pulled out of the individual utility proceedings and reviewed generically. The BPU intended to complete its review of each filing and render a final decision by October 1998 to meet its deadline for the introduction of retail competition by that month. The BPU set forth specific guidelines for the matters to be addressed in the three filings.

By an order of June 25, 1997 the BPU directed its Audit Division to initiate management audits on the four electric utilities and to solicit the assistance of consulting firms to

perform the audit. After issuing a request for proposals, and receiving and reviewing several proposals from independent auditors, the BPU selected Vantage/ICF Consulting (ICF) to perform an audit of PSE&G's filings.

On July 11, 1997 the BPU issued an order which established procedures for the filings: the utility's rate unbundling and stranded cost filings would be transmitted to the Office of Administrative Law (OAL) for hearings and an Initial Decision; the BPU would retain the restructuring plan filings for its own review and, if necessary, for hearings. The BPU intended to issue a Final Decision and Order in all of the matters before the anticipated start date of competition.

On July 15, 1997 PSE&G submitted a single filing containing its rate unbundling, stranded costs, and restructuring proposals, as well as prefiled direct testimony of seven witnesses. The BPU transmitted the unbundling and stranded cost portions of the filing to the OAL, where ALJ Louis McAfoos was assigned to the matter. The BPU retained the restructuring portion of the filing for its own review. The ALJ granted intervenor and participant status to over thirty groups, representing the diverse concerns of utilities, customers, suppliers, labor, and environmental groups. The BPU also granted intervenor and participant status to interest groups.

On September 25, 1997 the BPU issued an order establishing procedures for the restructuring filings, identifying issues with generic implications, and directing the creation of working groups to review the generic issues and submit status reports by January 10, 1998. On January 28, 1998 the BPU established a procedural schedule for review of generic restructuring issues, e.g., divestiture of generation assets, functional separation plans, and mechanics of the phase-in of retail competition.

In November 1997, thirteen intervenors and the RA submitted the prefixed testimony of twenty-five witnesses. PSE&G filed the rebuttal testimony of ten witnesses. ALJ

McAfoos conducted a status conference on January 16, 1998 and on January 24 issued a hearing schedule for the unbundling and stranded cost matters. In late January 1998, the intervenors filed the surrebuttal testimony of eighteen witnesses. On January 29, 1998 the BPU released ICF's audit report on PSE&G's unbundling and stranded cost filings, and on March 5, 1998, it released ICF's report on PSE&G's restructuring filing .

The OAL conducted twenty days of evidentiary hearings on the unbundling and stranded cost matters, from February 9 to March 18, 1998. In April 1998, after the hearings were completed, the parties filed briefs. On the restructuring matter, BPU Commissioner Carmen Armenti held twenty days of hearings between April 27 and May 28, 1998. Thirteen intervenors, the RA, and PSE&G filed the testimony of forty-five witnesses. Representatives of ICF and the three other consulting firms which submitted audit reports on the four utilities' restructuring filings also testified. Briefs on the restructuring issues were filed in June and July 1998.

ALJ McAfoos issued an Initial Decision on the rate unbundling and stranded cost matters on August 14, 1998. The parties filed exceptions and replies to exceptions in October 1998. One matter the ALJ did not resolve was the quantification of stranded costs, although he offered guidance on how the amount should be calculated. After the parties conferred on the issue but could not agree on a stranded cost total, the BPU had TCF prepare a report on the quantification of stranded costs. The BPU relied on the ICF report in its Final Decision.

Meanwhile, in September 1998, a draft of the deregulation bill was introduced in the New Jersey Legislature. The final draft was introduced in both the Assembly and Senate on January 25, 1999. On January 28, 1999 the Assembly passed the bill by a vote of sixty to nine and the Senate passed it by a vote of twenty-seven to six. It was approved on February 9, 1999, the effective date of the Act.

The Act establishes the framework and time schedules for deregulation and restructuring of electric utilities in New Jersey. Statement attached to Assembly Bill A-16, P.L. 1999, c. 23. It mandates a 5% rate reduction by August 1, 1999, the date at which retail competition was to begin, and at least a 10% rate reduction within three years of that date. N.J.S.A. 48:3-52(d) and 3-53(a). The maximum rate reduction must be sustained at least until the end of the fourth year after August 1, 1999 (July 31,. 2003). N.J.S.A. 48:3-52(j). As of August 1, 1999, electric companies had to unbundle their rates and separately identify charges for discrete services, such as generation, distribution, and transmission. N.J.S.A. 48:3-52(a). The Act also establishes "shopping credits" for customers who choose to purchase generation service from an alternative supplier; this reduces their rates and offers an incentive to shop for alternative electric suppliers. N.J.S.A. 48:3-52(b).

Although the Act does not mandate total divestiture, it allows utilities to functionally separate their generation assets and transfer them to an affiliate. N.J.S.A. 48:3-59. The utilities are permitted to recover stranded costs -- the generation plant costs which the utility is at risk of losing when the supply market is opened to competition -- through a limited-duration (up to eight years) nonbypassable market transition charge (MTC). N.J.S.A. 48:3-61(a). Starting on August 1, 1999 the utilities may collect a nonbypassable Societal Benefits Charge (SBC) designed to recover the costs for social programs, nuclear plant decommissioning, demand-side management (DSM) programs, environmental programs, and consumer education programs. N.J.S.A. 48:3-60(a). They are also permitted to impose a nonbypassable transition bond charge (TBC) (for up to fifteen years) in order to recover stranded costs. N.J.S.A. 48:3-62(a). The transition bonds, issued pursuant to a BSCRO, finance eligible stranded costs. N.J.S.A. 48:3-64(a). Financing, or securitizing, stranded costs through the issuance of asset-backed securities mitigates the rate impact of stranded cost recovery because

the interest rates through financing are lower than the utility's historic cost of capital.

On February 11, 1999, consequent upon passage of the Act, the BPU set a schedule to render its decision, but also urged the parties to attempt to negotiate a settlement by March 3, 1999. On March 8, 1999 the Mid-Atlantic Power Supply Association (MAPSA) moved to reopen and supplement the record in the PSESG unbundling and stranded cost proceedings. The RA and NJBUS supported MAPSA's motion; PSE&G opposed it. The BPU denied the motion on March 25, 1999 finding there was ample evidence in the record for its decision and that the entire proceedings had been conducted in contemplation of deregulation.

On March 17, 1999 eight parties submitted a proposed stipulation of settlement (Stipulation I): they were PSE&G, New Jersey Transit Corporation, Tosco, NJCS, Enron, IEPNJ, International Brotherhood of Electrical Workers Local 94, and National Resources Defense Council. On March 29, 1999 six other parties submitted an alternative settlement proposal (Stipulation II): they were the RA, NJBUS, MAPSA, New Energy Ventures, New Jersey Industrial Customers Group, and New Jersey Public Interest Intervenors (excluding the Natural Resources Defense Council). In April 1998 both groups of negotiators submitted comments on each other's stipulations.

The BPU held a public agenda meeting to consider the proposals and on April 21, 1999 issued a summary order, finding Stipulation I more financially prudent and consistent with the Act's requirements than Stipulation II. On August 24, 1999 the BPU issued its Final Decision and Order, which supplemented and elaborated on the April summary order. It announced that PSE&G was permitted to securitize up to $2.4 billion of its stranded costs.

On June 8, 1999, after the BPU issued its summary order but before it issued its Final Decision, PSE&G filed a petition with the BPU, seeking a BSCRO to securitize $2.4 billion in

stranded costs. On August 11, 1999 the RA filed comments, raising thirteen arguments in opposition to PSE&G's financing petition and requesting that evidentiary hearings be held on the issue. On August 24, 1999 the BPU held a public meeting at which it rendered the decision that no hearings were required. On September 17, 1999 the BPU denied Co-Steel's and NJBUS's motions to intervene in the securitization proceeding and issued a BSCRO approving PSE&G's securitization.

Co-Steel and NJBUS have filed separate appeals from the Final Decision and Order in the unbundling, stranded costs, and restructuring matter and from the BSCRO. (A-1108-99T3 and A-772-99T3 are Co-Steel's appeals from the restructuring and financing matters; A-643-99T3 and A-1108-99T3 are NJBUS's appeals from those matters.) We consolidated the four appeals. Although the RA considered itself a respondent and did not file a notice of appeal, we directed it to file an appellant's brief on all matters on which it opposed the BPU's orders. We granted PSE&G's motion to accelerate the appeal.

III

CO-STEEL'S CONTRACT IMPAIRMENT AND RELATED CLAIMS

We first consider Co-Steel's contention that the BPU's order, imposing stranded cost charges on it, was an unconstitutional impairment of its special ten-year contract with PSE&G from 1995 through 2005. Co-Steel claims that the order allows PSE&G to impose an "exit fee" on Co-Steel after the contract term expires, which in effect increases the agreed price of electricity during the contract term. In addition to constitutional considerations, Co-Steel says that principles of equity and estoppel should preclude PSE&G from imposing stranded cost charges because it relied on the contract in deciding to remain in New Jersey rather than moving its operations to Kentucky, where power costs were

less expensive, and also by investing $37 million in the Perth Amboy plant. In the alternative, Co-Steel argues that even if we allow imposition of stranded cost charges, the BPU incorrectly applied the Act to its contract in three ways: (1) the BPU should have applied the rate reduction to all of its electricity consumption rather than to "block 1" only; (2) the rate reduction scheduled for August 2002 should reduce rates by 10% from their 1997 level not 13.9% from their 1999 level; and (3) the August 1999 rate reduction should reduce rates by 5% from their 1997, not 1999, level, a point which all appellants raise and which we consider separately.

The United States Constitution, art. I, § 10, provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." Our New Jersey Constitution, art. IV, § 7, ¶ 3, has a parallel prohibition. Despite the difference in language, the federal and state Contract Clauses are applied coextensively and provide the same protection. Fidelity Union Trust Co. v. New Jersey Highway Auth., 85 N.J. 277, 299-300, appeal dismissed, 454 U.S. 804, 102 S. Ct. 76, 70 L. Ed. 2d 73 (1981).

The prohibition against impairment of contracts under the federal and state constitutions is not absolute. It "must be accommodated to the inherent police power of the states to safeguard the vital interests of their residents." In re Recycling & Salvage Corp. 246 N.J. Super. 79, 100 (App. Div. 1991). "The contract clause does not deprive the states of their power to adopt general regulatory measures even if those regulatory measures result in the impairment or destruction of private contracts." Ibid.

Our federal and state courts apply a three-prong test to determine whether legislation has unconstitutionally impaired a contract: they ask (1) has it substantially impaired a contractual relationship? (2) if so, does it have a significant and legitimate public purpose? and (3) is it based on reasonable conditions and reasonably related to appropriate governmental objectives? State Farm Mut. Auto. Ins. Co. v. State, 124 N.J. 32, 64 (1991).

In determining whether a contract impairment is substantial, courts consider whether the industry has been regulated in the past. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 242 n.13, 98 S. Ct. 2716, 2721 n.13, 57 L. Ed. 2d 727, 735 n.13 (1978) ("When he purchased into an enterprise already regulated in the particular to which he now objects," he purchased subject to further legislation upon the same topic). On this first prong of the test, courts may also consider whether one of the parties reasonably relied on the contractual terms and whether the legislation was an unexpected modification of those terms. Nieves v. Hess Oil Virgin Islands Corp., 819 F.2d 1237, 1247 (3d Cir.), cert. denied, 484 U.S. 963,108 S. Ct. 452, 98 L.Ed. 2d 392 (1987). Fon example, in Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 416, 103 S. Ct. 697, 707, 74 L. Ed. 2d 569, 583-84 (1983), the Court said that the natural gas contracts at issue "expressly recognize the existence of extensive regulation by providing that any contractual terms are subject to relevant present and future state and federal law," and could be interpreted "to incorporate all future state price regulation. . . ." At the very least, the Court said, the provision suggested that the gas company "knew its contractual rights were subject to alteration by state price regulation." Id. at 416, 103 S. Ct. at 707, 74 L. Ed. 2d at 584. As to the second and third prongs of the test, the legitimacy and reasonableness of legislation, the courts generally defer to legislative judgment, unless the State itself is a contracting party. Id. at 412-13, 103 S. Ct. at 705, 74 L. Ed. 2d at 581 (holding that a state statute regulating the price of natural gas did not violate the contract clause even if it did impair an energy company's contract with a public utility).

Here, respondents BPU, PSE&G, and RA counter Co-Steel's contract impairment argument by asserting that Co-Steel fails to satisfy the first prong of the test because the Act and the BPU restructuring order did not impair its contract; in fact, the end result was lower rates than provided for under the contract. The ten-year service agreement between Co-

Steel and PSB&G was approved by the BPU on November 17, 1995, with the new rate effective retroactive to April 1, 1995. On July 24, 1995 a stipulation signed by the parties, the Attorney General (for the BPU), and the RA modified the agreement, specifically with reference to the Experimental Hourly Energy Pricing Tariff (EHEP) service offered to Co-Steel. The stipulation also refers to a July 1995 agreement with the New Jersey Treasury for a lower tax rate on the energy purchased under the contract.

The agreement between Co-Steel and PSE&G articulates the motivations of the parties: Co-Steel would forego closing its steel plant in Perth Amboy and moving its operations out of state, and would invest at least $37 million in improvements to its Perth Amboy plant between 1995 and 1999 in consideration for the special discounted pricing that PSE&G offered.

Under the agreement, electric services to Co-Steel would be priced in two blocks: the first 13 million kWh (block 1), which accounts for about one-third of Co-Steel's annual electricity consumption, would be billed monthly "at prices, terms, and conditions identical to PSE&G's then effective Rate Schedule High Tension Service (HTS)," that is, whatever the HTS tariff rate was at a particular time. Anything over 13 million kWh (block 2) would be billed at PSE&G's "marginal energy cost" (the cost of the electric utilities that make up the "PJM" power pool—Pennsylvania, New Jersey, Maryland, and Delaware). Block 2 usage is governed by the EHEP service agreement, under which Co-Steel, the only customer under this service, would receive a discounted rate, with the cost of energy "vary[ing] hourly with changes in Public Service's marginal energy cost." According to Vincent Dimiceli, controller of Co-Steel, the effect of this "interruptible service" contract was to reduce its cost of electricity from an average of 5.9 cents per kWh to an average of 4.2 cents per kWh. The contract is silent as to what might occur when the contract term expired in 2005.

In the BPU order of August 24, 1999 the Commissioner ruled that, under the Act, N.J.S.A. 48:3-60, -61, and -67, HTS customers, along with all other electric public utility customers (except eligible on-site generator customers, N.J.S.A. 48:3-77), were subject to nonbypassable stranded cost charges (MTC, TBC, and SBC). At the same time, HTS customers would also receive rate reductions totaling 13.9% by August 1, 2002, and those reductions were, in part, due to securitization of the stranded cost charges. However, since Co-Steel's block 2 usage was governed by the special EHEP contract, it would be unaffected by the BPU order. The BPU refused to exempt Co-Steel from imposition of stranded cost charges, which could continue up to fifteen years after transition bonds are issued, well beyond the expiration of Co-Steel's contract.

According to Co-Steel, before the contract went into effect, its annual electric bill was $24 million, and under the contract the annual bill was lowered to $18 million. Co-Steel admits that, despite the imposition of surcharges on its HTS consumption, its block 1 costs would decrease under the BPU order due to the rate reductions applied to HTS customers. It also acknowledges that its block 2 rates are unaffected by the Act. Thus, the overall effect of the order will be "either neutral or . . . a slight decrease." However, Co-Steel believes that after the contract expires, when the mandatory rate reductions are no longer in effect, the transition charges authorized by the BPU order will allow PSE&G to collect between $4.5 and $6 million per year for ten or more years beyond the contract term. N.J.S.A. 48:3-61(i) (MTC charges may be imposed for up to eight years); N.J.S.A. 48:3-62(d)(1) (TBC charges may be imposed for up to fifteen years).

Thus, Co-Steel appears to admit that during the term of the contract the Act, as applied by the BPU order, will not impair its contract, but will in fact enhance it. Not until after the contract expires, will Co-Steel have considerable charges which it allegedly did not anticipate when negotiating the terms of the contract.

We conclude that the contract impairment argument is undermined by Co-Steel's failure to include contingencies for post-contract charges even though its own controller, Dimiceli, acknowledged that at the time he was negotiating the contract, in the fall of 1994, he was "generally aware that electric industry deregulation was somewhere on the horizon and that it might occur to one degree or another in the succeeding few years"; he believed that "there was a good chance [that competition] would arrive sometime during the ten-year term of our contract."

Co-Steel's argument is also undermined by two provisions of the agreement which allow for unilateral changes in its terms:

> 7. Taxes, Assessments or Other Charges: In the event that PSE&G incurs any taxes, assess-ments of or other charges in connection with the services to be provided hereunder, which were not applicable at the time of entering into this Agreement, including any increase in the Gross Receipts and Franchise Unit Tax, such taxes, assessments or other charges shall be passed through to Raritan as an increase in PSE&G's costs of providing service hereunder . . . .
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> *****
>
> 9. Laws, Regulations, Orders, Approvals and Permits:
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> This Agreement is made subject to present and future local, state and federal laws and to the regulations or orders of any local, state or federal regulatory authority having jurisdiction over the matters set forth herein . . . .

As in Energy Reserves, 459 U.S. at 416, 103 S. Ct. at 707, 74 L. Ed. 2d at 584, the express language of paragraph nine of the agreement suggests that Co-Steel knew that its contractual rights were subject to alteration by state legislation. Thus,

Co-Steel cannot have reasonably relied on the immutability of the agreement.

Co-Steel tries to distinguish the types of charges allowed under paragraph seven of the agreement and those imposed by the Act. It says that whereas paragraph seven allows PSE&G to "pass through" to Co-Steel any "taxes, assessments of or other charges [incurred by PSE&G] in connection with the services to be provided . . . as an increase in PSEG's costs of providing service," stranded cost charges are "amounts collected by PSE&G for the benefit of its shareholders" and incurred before the contract was negotiated; thus, they do not represent an increase in the cost of providing service during the term of the contract. Although such semantic distinctions may be true and have a certain allure, they do not alter the fact that the Legislature has mandated that stranded cost charges be passed along to customers as a cost of service. N.J.S.A. 48:3-60, -61, and -67. Thus, such charges are covered under the plain language of paragraph seven.

We conclude that Co-Steel's contract has not been substantially impaired but even if Co-Steel could satisfy this first prong of the test, it fails the second and third prongs. Co-Steel concedes that there is a legitimate purpose behind the collection of stranded costs by utilities and recognizes the legislative policy stated in the Act: to "[p]rovide for a smooth transition from a regulated to a competitive power supply marketplace" and to "maintain the financial integrity of the electric public utility through the transition to competition. . . ." N.J.S.A. 48:3-50(a)(12) and (c)(4).

However, Co-Steel contends that the imposition of stranded cost charges on it was not reasonable, and that we should not defer to the BPU's judgment because the State is a party to the contract. Although the BPU approved the contract and the Attorney General signed the 1995 stipulation on modifications to the contract, the real parties to the contract are PSE&G and Co-Steel. Deference must be accorded the legislative judgment and BPU's judgment concerning interpretation of the Act. Energy Reserves, 459

U.S. at 412-13, 103 S. Ct. at 705, 74 L. Ed. 2d at 581; New Jersey Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 575 (1978).

Co-Steel argues that the stranded cost charges are a devastating burden for it but because they represent only a tiny fraction of the total to be collected by PSE&G, their loss would jeopardize neither PSE&G nor electric utility competition. The BPU responds by saying there is no justification for treating Co-Steel differently from all other customers: PSE&G will continue to provide distribution, transmission, and customer services after expiration of the contract, and Co-Steel should be obligated to pay its share of providing those services and its share of the stranded costs charges, which but for the Act would have been recovered in PSE&G's rates on a continuing basis. We also recognize that the nonbypassable stranded cost charges are not exit fees assessed only to customers who leave the utility but rather are imposed on all customers, whether or not they choose another energy supplier.

We think it unreasonable to treat Co-Steel differently from other PSE&G customers when its contract does not specifically call for any special post-contract treatment. It now is receiving the benefit of reduced rates through the contract, certain tax relief from the State, and the rate reductions resulting from the Act. When the contract expires, if it remains in New Jersey, it may also receive benefits from competition among electricity suppliers. We conclude it reasonable that Co-Steel bear its share of the stranded cost charges that are an integral part of the legislative deregulation scheme.

Co-Steel also argues that equitable principles should preclude imposition of these charges since it detrimentally relied on its contract when deciding to remain in New Jersey and invested $37 million in improvements to its Perth Amboy plant. But Co-Steel was aware that deregulation was literally "around the corner" and would most likely occur during the term of the contract. In fact, according to Dimiceli, Co-Steel

was looking forward to "tak[ing] advantage of open competition after the contract expired." He saw the contract as a "trade-off": Co-Steel "would lock into a favorable electric rate for ten years, but in exchange we would be giving up the opportunity to participate in any competitive market for electricity that might develop before the end of our contract term." Co-Steel appears to want a "double bite," the favorable contract rate and the advantages of competition, but none of the associated costs of deregulation. The equities do not favor Co-Steel under these circumstances. Their reliance was not so much detrimental as it was shrewd.

Co-Steel's alternative argument addresses three specific aspects of the BPU order it contends were error. First, Co-Steel asserts that the rate reduction mandated by the Act should be applied to all of its usage, not just block 1 HTS usage because (1) it is unfair to impose on it the full burden of stranded cost charges but allow it only half the rate decrease granted other customers, and (2) N.J.S.A. 48:3-52(d)(1) mandates rate reductions for each "customer class," a category into which Co-Steel must, by logic, fall.

N.J.S.A. 4813-52(d)(1) provides:

> During a term to be fixed by the board, each electric public utility shall reduce its aggregate level of rates for each customer class, including any surcharges assessed pursuant to this act, by a percentage to be approved by the board, which shall be at least 10 percent relative to the aggregate level of bundled rates in effect as of April 30, 1997, subject to the provisions of paragraph (2) of this subsection.

The Act does not define "customer class."

In its August 24, 1999 Final Decision, the BPU determined that the rate reduction and the stranded cost charges applied to Co-Steel's HTS block 1 usage, but that the Act would not affect its block 2 usage, which was governed

by the EHEP contract. In its October 19, 1999 denial of Co-Steel's motion for reconsideration, the BPU clarified that the MTC, TBC, and SBC stranded cost charges would not be imposed on the block 2 discounted rate, and that the discounted rate would not be affected by the Act. It was only the HTS tariff usage (block 1) that would be affected by both the stranded cost charges and the rate reductions mandated by the Act, because that tariff was not "designed . . . to insulate customers from future additional charges relating to the provision of service." The BPU's decision was grounded solidly on holding the parties to the terms of Co-Steel's contract with PSE&G.

As to the definition of "customer class," the BPU interpreted it to mean "customers served under fixed tariffs, not customers that have made separate arrangements to receive service at heavily discounted rates." Although Co-Steel makes a strong argument that it should be considered as part of a customer class, it ignores the fact that it bargained for a special rate that literally put it into a class by itself: it is the only PSE&G customer receiving a discounted rate under an EHEP service agreement.

The interpretation of "customer class" announced by the BPU, the administrative agency charged with the enforcement of the Act, should be given great weight by the court. New Jersey Guild of Hearing Aid Dispensers, 75 N.J. at 575; In re South Jersey Gas Co., 226 N.J. Super. 327, 333 (App. Div. 1988), aff'd, 116 N.J. 251 (1989). However, even without reaching the validity of that interpretation, the underlying principle of enforcing a contract as written was a valid basis for the BPU's decision.

Co-Steel next argues that, under N.J.S.A. 48:3-52(d)(1)[1], it is entitled to a 10% reduction from its April 30, 1997, rates

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[1] N.J.S.A. 48:3-52(d)(1) and (2) states:

> d. (1) During a term to be fixed by the board, each electric public utility shall reduce its aggregate level of rates for each customer

rather than a 13.9% reduction from current rates by August 1, 2002 as ordered by the BPU, because the BPU's decision was premised on the 3.9% increase experienced by most PSE&G customers in 1998, whereas Co-Steel's increase during that period was 9%.

N.J.S.A. 48:3-52(d)(1), quoted above, mandates a rate reduction that is at least 10% below the April 30, 1997 rates, to be implemented "[d]uring a term to be fixed by the board." The following subsection of the statute allows the BPU to "set a term for an electric public utility to phase in a rate reduction of ten percent or more during the first 36 months after the starting date for the implementation of retail choice" (August 1, 1999) and requires that the rate reduction on August 1, 1999, be at least 5%. N.J.S.A. 48:3-52(d)(2). The statute allows the BPU to order a rate reduction greater than 10% "if it determines that such reductions are necessary in order to achieve just and reasonable rates." N.J.S.A. 48:3-52(e).

In its Final Decision, the BPU ordered cumulative rate reductions that would equal 5% effective August 1, 1999, 7% "on or about" January 1, 2000, 9% effective August 1, 2001 and 13.9% effective August 1, 2002. The BPU explained this decision in addressing Co-Steel's arguments in its motion for

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class, including any surcharges assessed pursuant to this act, by a percentage to be approved by the board, which shall be at least 10 percent relative to the aggregate level of bundled rates in effect as of April 30, 1997, subject to the provisions of paragraph (2) of this subsection.

(2) The board may set a term for an electric public utility to phase in a rate reduction fo ten percent or more during the first 36 months afte the starting date for the implementation of retail choice as provided in subsection a. of section 5 [N.J.S.A. 48:3-53(a)] of this act; provided, however, that, on the starting date for the implementation of retail choice as provided in subsection a. of section 5 of this act, each electric public utility shall reduce its aggregate level of rates for each customer class, including any surcharges assessed pursuant to this act, by no less than five percent.

reconsideration. It said that whether or not Co-Steel should receive only a 13.9% reduction on August 1, 2002,

> will depend to a large extent on the particular tariff design to be developed for Co-Steel as an EHEP customer in 2002. Co-Steel's argument is based on the fact that because DSAF charges are recovered on a volumetric basis, its DSAF increases in 1998 were higher than those of other customers. Co-Steel thus asserts that it should experience, due to those earlier larger DSAF increases, a greater reduction in rates than those customers that may have experienced a DSAF increase closer to the overall average of 3.9 percent. The Board agrees that this issue should be looked into at the time the appropriate tariff designs covering these future rate reductions are completed and approved by the Board. Therefore, before the Board gives its final approval to rate reduction to be effective on August 1, 2002, it will consider the appropriate rate design for all of its customers including Co-Steel. In doing so, the Board will be considering any arguments Co-Steel may wish to present at that time.
>
> [(emphasis added).]

Thus, the BPU acknowledges that Co-Steel's 1998 increases were greater than those of the average PSE&G customer, which may indicate the need for a reduction greater than 13.9% in 2002. The BPU merely asserts, as does PSE&G, that the issue is not ripe for adjudication at this point.

N.J.S.A. 48:3-52(d) gives the BPU the discretion to determine the amount of the rate reductions and the term during which they are phased in, as long as the August 1999 reduction is at least 5%, the total rate reduction is at least 10% over the 1997 level, and the phase-in period is accomplished within three years of August 1999. The BPU has acknowledged that for Co-Steel this may mean a greater than 13.9% increase by 2002, and that it will entertain Co-Steel's

arguments on the issue before ordering final approval on the 2002 increase. We see no dispute to resolve at this point.

Finally, Co-Steel contends that the 1999 rate reduction should be 5% from 1997 rates rather than 5% from 1999 rates. Appellants RA and NJBUS join in this argument. As discussed, N.J.S.A. 48:3-52(d)(1) mandates a rate reduction of atleast10% "relative to the aggregate level of bundled rates in effect as of April 30, 1997. . . ." The next subsection, N.J.S.A. 48:3-52(d)(2), gives the BPU discretion in phasing in the total reductions over the next three years, but it does require that utilities reduce rates "by no less than five percent." This subsection does not mention relative to what date the 5% decrease is to be compared. Because there was a 3.9% rate increase in 1998, a 5% reduction from current (1999) rates would be only a 1.1% reduction from 1997 rates.

Appellants argue that section (d)(2) must be read in conjunction with section (d)(1) to make sense; there was no need to repeat the specification about "relative to 1997 rates" when that language was already present in (d)(1). Respondents argue that the clear language of the statute must control; the Legislature knew how to include the specification "relative to 1997" when it wanted to do so, its failure to do so in section (d)(2) must have been intentional. In support of their position, appellants refer to the language of the BPU's April 30, 1997 Final Report when recommending "a near term rate reduction on the order of 5-10%":

> In response to concerns that these targeted rate reductions may be eroded by subsequent upward rate adjustments between now and the date of retail competition, we emphasize that the targeted rate reductions must be in comparison to the current level of rates as of the date of this report.
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> [(emphasis added).]

Indeed, the rate reduction in N.J.S.A. 48:3-52(d)(1) is from the 1997 level and thus complies with that recommendation. The traditional rubrics and principles of

statutory construction could lead to nothing more than our second-guessing the Legislature's intent. "The various canons or maxims of statutory construction are tools not icons. Wildwood Storage Center, Inc. v. Mayor & Council of the City of Wildwood, 260 N.J. Super. 464, 471 (App. Div. 1992). Common sense leads to the conclusion that the BPU's schedule of rate reductions is a reasonable interpretation of the statute. "Statutory interpretations should turn on the breadth of the legislative objectives and the common sense of the situation." Cty. of Camden v. S.J. Port Corp., 312 N.J. Super. 387, 396 (App. Div.), certif. denied, 157 N.J. 542 (1998). Also, "[o]ur task is to harmonize the individual sections and read the statute in the way that is most consistent with the overall legislative intent." Fiore v Consol. Freightways, 140 N.J. 452, 466 (1995).

Appellants are in essence saying that, of the total 13.9% in rate reductions, the 1999 reduction should be 8.9%, with the remaining 5% to come by 2002. Thus the greater part of the total reductions would be implemented immediately rather than spread more evenly over the course of three years. One of the primary concerns of the Act is the financial integrity of the utilities. N.J.S.A. 48:3-50(c)(4). The decision to spread the rate reductions out more evenly over the course of three years was consistent with that goal. Further undermining the argument to the contrary is the RA's proposal in Stipulation II, dated March 29, 1999, that the August 1, 1999, 5% rate reduction be from current (1999) rates.

IV

PROCEDURAL DUE PROCESS CONCERNS

Appellants RA and NJBUS contend that the regulatory proceedings involved numerous procedural irregularities which violated federal and state due process protections, principles of fundamental fairness, the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15 (APA), the BPU's own regulations, and the Act itself. In particular, they point to

the BPU's refusal to reopen the record after passage of the Act despite substantial changes in the legal standards on the basis of which the record had been developed. The RA also points to adoption of aspects of Stipulation I which had not been raised previously, without first giving the nonsettling parties an opportunity to address these issues in an evidentiary hearing. The RA alleges that the BPU, in its Final Decision, relied on an auditors' report, a document not in evidence, in arriving at a sum quantifying the amount of PSE&G's stranded costs. As to the securitization decision, the RA contends that the BPU violated the APA by failing to conduct hearings on PSE&G's financing petition and NJBUS contends that the BPU violated its own regulations when it excluded NJBUS from intervening in the securitization proceedings.

The Public Utilities Act, N.J.S.A. 48:2-2 to -91, gives this court jurisdiction to review any order of the BPU and to set all or part of an order aside "when it clearly appears that there was no evidence before the board to support the same reasonably." N.J.S.A. 48:2-46. However, the Public Utilities Act specifically prohibits this court from reversing BPU orders for minor procedural irregularities:

> No order shall be set aside in whole or in part for any irregularity or informality in the proceedings of the board unless the irregularity or informality tends to defeat or impair the substantial right or interest of the appellant.
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> [N.J.S.A. 48:2-46.]

This provision attempts to reconcile the Legislature's "sweeping grant of power" to the BPU to regulate utilities, [In re Alleged Violations of Law By Valley Road Sewerave Co., 154 N.J. 224, 235 (1998), with constitutional due process guarantees and principles of fundamental fairness.

The Fourteenth Amendment of the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." Article I, paragraph 1 of the New Jersey Constitution protects

similar interests. Greenberg v. Kimmelman, 99 N.J. 552, 568 (1985). "Due process is a flexible concept that calls for such procedural protections as fairness demands," the essential components of which are notice and an opportunity to be heard. Mettinger v. Globe Slicing Mach. Co. Inc., 153 N.J. 371, 389 (1998).

Where constitutional protections do not adequately safeguard an important interest, principles of fundamental fairness come into play. State v. P.Z., 152 N.J. 86, 117 (1997). New Jersey's doctrine of fundamental fairness protects against "unjust and arbitrary governmental actions, and specifically against governmental procedures that tend to operate arbitrarily." John Doe v. Poritz, 142 N.J. 1, 108 (1995). This is a doctrine sparingly applied but available, "where the interests involved are especially compelling." Ibid.

In assessing the procedural adequacy of administrative proceedings, we start with the proposition that "[a]dministrative agencies enjoy a great deal of flexibility in selecting the proceedings most suitable to achieving their regulatory aims." Bally Mfg. Corp. v. New Jersey Casino Control Comm'n, 85 N.J. 325, 338, appeal dismissed, 454 U.S. 804, 102 S. Ct. 77, 70 L. Ed. 2d 74 (1981). For example, administrative agencies have the discretion to decide whether a case is to be classified as "contested," ibid. (citing N.J.S.A. 52:14F-7(a) of the ALA), whether to reopen a hearing to admit further evidence before the entry of a final decision, In re Kallen, 92 N.J. 14, 24 (1983), and whether to "look[] beyond the four corners of the record" in making a final determination. In re Shore Hills Water Co., 101 N.J. Super. 214, 222 (App. Div. 1968).

"Normally courts defer to the procedure chosen by the agency in discharging its statutory duty," subject, of course, to the requirements of due process and the APA. In re Request for Solid Waste Util. Customer Lists, 106 N.J. 508, 519 (1987). The agency has discretion "to select those procedures most appropriate to enable the agency to implement

legislative policy." Texter v. Department of Human Services, 88 N.J. 376, 385 (1982). Thus, the lines between rulemaking and formal adjudication sometimes become blurred; in fact, informal action constitutes "the bulk" of administrative action. In re Request for Solid Waste Util., 106 N.J. at 518.

In rate-setting cases, where the administrative agency must balance competing consumer and utility interests, courts allow the agency "the fullest exercise of administrative discretion." In re Rockland Elec. Co., 231 N.J. Super. 478, 494-95 (App. Div.), certif. denied, 117 N.J. 129 (1989). Unless therein a fundamental deficiency in procedure, exercises of administrative judgment will be affirmed as long as they are based on sufficient credible evidence and do not result in arbitrary or unreasonable consequences. In re N.J. Bell Tel. Co., 291 N.J. Super. 77, 89-91 (App. Div. 1996).

IV A. THE BPU DID NOT ERR IN REFUSING TO REOPEN THE RECORD AFTER PASSAGE OF THE ACT.

From late 1997 to 1999, when the unbundling, stranded costs, and restructuring proceedings were conducted, the standards which the parties relied on were the BPU's recommendations to the Legislature in its 1997 Final Report. The OAT proceedings for all four utilities were, in part, legislative-type hearings in the sense that they gathered evidence on generic issues affecting the deregulation process as a whole. As the hearings proceeded, the BPU's staff drafted proposed legislation, which it shared with the parties, and which was considered by the Legislature. The final draft of the deregulation bill was introduced on January 25, 1999, was passed by both the Assembly and the Senate three days later, and was approved on February 9, 1999 effective immediately. There were no traditional legislative hearings.

The Act mandated that rate reductions and competition begin by no later than August 1, 1999 less than six months after the Act went into effect. N.J.S.A. 48:3-53(a). To expedite the process of preparing for competition, the Act allowed the BPU to rely on proceedings dating as far back as April 1, 1997 when taking regulatory action:

> This act shall take effect immediately, except that, to the extent not already provided for by existing law, the authority of the board to order rate unbundling filings, restructuring filings, and stranded cost filings, perform audits of utility competitive services and take such other regulatory actions, including, but not limited to, the holding of hearings, providing of notice and opportunity for comment, the issuance of orders, and the establishment of standards, including auction standards adopted for application to an electric public utility that is executing a divestiture plan, and to take such other anticipatory regulatory action as it deems necessary to fulfill the purposes or requirements of this act shall apply retroactively to April 1, 1997 provided that the board shall take such actions as may be necessary, if any, to ensure that the requirements of this act are met in all regulatory actions related to this act which were commenced prior to its enactment.
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> [N.J.S.A. 48:3-98 (emphasis added).]

There is accuracy to PSE&G's characterization of the administrative proceedings and the development of the legislation as being on a "parallel track." Appellants were aware of this because they were active participants in the process, as were over thirty other intervenors from the commercial, public interest, and utility sectors.

In the BPU's Final Decision, it rejected the contention "of some of the parties" that the record should be reopened, basing its decision on its March 25, 1999 order denying a

motion by the Mid-Atlantic Power Supply Association (MAPSA) to reopen the record after passage of the Act. There, the BPU said that the new legislation was not in and of itself a "sufficient basis to reopen the record." It continued:

> The record in this case clearly contemplated the enactment of comprehensive electric deregulation legislation. The hearings at the OAL were intended to develop an extensive record with respect to factual rate unbundling and stranded costs issues, while the restructuring plan hearings before the Board were intended to develop an extensive record on the more generic restructuring policy issues, all of which would then be used by the Board to develop a final order for each electric utility consistent with the legislative requirements, including the schedule laid out by the Legislature for the commencement of competition.
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> Based on our review of the Act and the record below, we find that the parties have had an extensive opportunity to litigate all relevant issues through discovery, the filing of testimony, many days of evidentiary hearings, cross-examination, initial and reply briefs and Exceptions and Reply Exceptions to the Initial Decision. The Board disagrees with and HEREBY REJECTS the generalized contentions of MAPSA, the Ratepayer Advocate, ACE, and NJBUS that the record needs to be reopened to comply with the requirements of the Act and/or due process.

The RA supported MAPSA's motion, but on grounds other than the claim that passage of the Act changed the standards on which the matter was litigated.

The RA now contends that the Act made two significant changes to the Final Report, necessitating taking additional evidence as permitted under N.J.S.A. 48:3-98. The changes

they point to are: (1) the Act resulted in a standard for stranded cost eligibility for post-1992 capital additions more favorable to utilities than the standard under the Final Report; and (2) the Act allowed a utility to securitize up to 75% of its generation-related stranded costs, whereas the BPU's September 19, 1997 order limited securitization to 50% of the BPU-determined stranded cost level.

NJBUS contends that the Act established new standards for determining stranded costs and shopping credits, concepts that did not exist in the Public Utilities Raw prior to passage of the Act. NJBUS also contends the BPU violated its own regulations when it denied MAPSA's motion to reopen the record, because N.J.A.C. 14:1-8.4 allows for reopening if there have been any "material changes of fact or law" since the last hearing.

At the outset, we recognize that the BPU's Final Decision was not based strictly on the standards announced in the Final Report and the record developed based on those standards, but on an agreement (Stipulation I), between some of the parties to which the appellants had ample opportunity to respond through comments. None of the changes referred to by the RA and NJBUS came as a surprise to them. Although stranded costs and shopping credits were not a part of the body of earlier Public Utilities Law, they were concepts which the parties had been aware of throughout these proceedings to the Final Report stage, when the deregulation legislation was being drafted and as the administrative hearings were being held.

The first change referred to by the RA, criteria for stranded cost eligibility of post-1992 capital additions, made it easier for PSE&G to meet the eligibility requirements. See N.J.S.A. 48:3-61(c). Thus, the standard on which the administrative proceedings were based was less favorable to PSE&G. At the OAR hearings, under the earlier, more difficult standard, the RA contested PSE&G's requested stranded cost recovery of $1.4 billion attributable to capital additions; the BPU staff, after reviewing the independent

auditor's report, supported inclusion of many but not all of the fossil and nuclear projects for which PSE&G sought stranded cost recovery. The ALJ agreed with the BPU staff that PSE&G had substantially justified inclusion of the bulk of its post-1992 capital additions and recommended that the BPU recognize their inclusions for stranded cost calculation purposes. In its Final Decision, the BPU accepted the stranded cost figure agreed to in Stipulation I.

The RA does not clarify how reopening the record to take evidence under the new, more lenient standard would help utility customers, who received the benefit of the more rigorous standard at the OAL hearings. Indeed, it seems more likely to hurt them. Nor does NJBUS explain how its cause would be aided by reopening the record on the Act's new standards for determining stranded costs and shopping credits.

The second change referred to by the RA, the right to securitize up to 75% of stranded costs rather than 50%, is really a substantive challenge to the statute rather than a due process argument. The RA explains how securitizing stranded costs precludes a "true-up" of the recovery amount to actual market costs because the transition bond order is legally irrevocable, but does not explain how taking evidence on this new securitization cap could hope to change the Final Decision. Indeed, according to the BPU's theory, it permitted PSE&G to securitize only 48% of its stranded costs. Thus hearing evidence on the new cap would have had no effect on the Final Decision.

Finally, NJBUS contends that the BPU violated N.J.A.C. 14:1-8.4 by failing to grant MAPSA's motion to reopen the record. That regulation describes the method for requesting that a hearing be reopened and gives the BPU the discretion to reopen hearings if it has "reason to believe that conditions of fact or of law have so changed as to require, or that the public interest requires, the reopening of such hearing. . . ." N.J.A.C. 14:1-8.4(b). The BPU soundly exercised its discretion when it determined that the passage of the Act did not raise any new issues uncontemplated during the course of the administrative

proceedings. NJBUS has not demonstrated how the BPU abused its discretion in denying MAPSA's motion to reopen.

IV B. THE BPU DID NOT ERR IN REFUSING TO REOPEN THE RECORD AFTER NEW ISSUES WERE ALLEGEDLY RAISED IN STIPULATION I.

The RA contends that Stipulation I raised three issues not addressed during the hearings: (1) formation of an unregulated affiliate (GENCO) and immediate transfer of PSE&G'S generating facilities to GENCO at book value; (2) a four-year transition period with rate reductions lasting only four years; and (3) the use of deferred accounting to achieve statutory rate reductions. The RA acknowledges that it had an opportunity to file comments on Stipulation I, but says that BPU had nothing in the record to review before adopting these newly-raised proposals and needed evidentiary hearings on them.

As a preliminary matter, since the RA had notice and an opportunity to be heard on the issues raised in Stipulation I, it received the essential requirements of due process. Mettinger 153 N.J. at 389. The BPU has the discretion to determine what kind of procedure was most appropriate to further legislative policy, Texter, 88 N.J. at 385, and it determined that proceeding on the basis of the record already before it, in addition to the parties' comments on the stipulations, was appropriate. Agencies are well within their authority to adopt stipulations as fact-finding tools, as long as they evaluate the stipulations and the parties have had an opportunity to argue against them. Petition of Pub. Ser. Elec. & Gas, 304 N.J. Super. 247, 268-72 (App. Div.), certif. denied, 152 N.J. 12 (1997). Furthermore, New Jersey has a strong public policy in favor of settlements. Dept. of Pub. Advocate, Div. of Rate Counsel v. New Jersey Bd. of Pub. Util., 206 N.J. Super. 523, 528 (App. Div. 1985). Here, although Stipulation I introduced some new proposals, it did not introduce new concepts which had never been considered by the parties during the proceedings.

IV-B 1. THE IMMEDIATE TRANSFER OF GENERATING FACILITIES TO AN UNREGULATED AFFILIATE, GENCO.

The Act allows for "the transfer of electric public utility assets from an electric public utility to a related competitive business segment of that electric public utility or of a public utility holding company. . . ." N.J.S.A. 48:3-55(d). N.J.S.A. 48:3-59(a) states that the BPU may require a utility to functionally separate its generation assets transferred to a holding company or a related competitive business segment, or it may order divestiture to an unaffiliated entity "if it finds that concentration or location of generation facilities results in market control that would adversely effect the formation of a competitive generation marketplace." Statement attached to Assembly Bill A-16, P.L. 1999, c. 23, comment on section 11. Complete divestiture has always been considered an option, and according to the BPU, the three other electric public utilities have chosen to divest themselves of their generating assets through sales to unaffiliated entities.

PSE&G'S original plan was to transfer its generating facilities to a separate unregulated entity after a seven-year transition period. This was the proposal which the ALJ discussed in his Initial Decision. There was, however, testimony on alternatives: for example, a witness on behalf of IEPNJ faulted PSE&G for separation of its generating facilities after, rather than at the beginning of, the transition period and a witness on behalf of the RA testified that complete divestiture was the best option.

During the settlement process, and after passage of the Act, PSE&G agreed to an immediate transfer of its generating facilities and assets to GENCO. In its Final Decision the BPU approved of the immediate transfer, saying that it was "amply supported by the record in this proceeding." The BPU found that the reason for PSE&G's delay of the transfer—"a liquid and visible capacity market did not yet exist in the PJM control area"—no longer existed and thus the conditions "support the immediate transfer of the assets." The BPU

noted that PSE&G proposed the immediate transfer in response to the "concerns voiced by a number of parties during these proceedings," adding that during the hearings several of the parties testified that "structural separation of generation-related assets into a separate corporate entity was necessary to provide adequate protections."

Thus, the various ways for an electric utility to handle its generation facilities—whether divestiture, transfer to an affiliate, or retention of generation facilities—were present in the testimony during the hearings. Because of the parties' opportunity to comment on Stipulation I, and the statutory validity of such a transfer, there was nothing procedurally unfair about the immediate transfer without further hearings.

IV-B 2. A FOUR-YEAR TRANSITION AND RATE REDUCTION PERIOD.

Under the Act, rate reductions must begin by August 1, 1999, N.J.S.A. 48:3-53(a), and be sustained for forty-eight months, or until July 31, 2003. N.J.S.A. 48:3-52(j). Although PSE&G originally proposed a seven-year transition period, Stipulation I proposed a four-year transition period -- from August 1, 1999, through July 31, 2003 -- during which rate reductions would be phased in. The RA and other parties to Stipulation II proposed a more extended period of rate reductions, with higher levels of reductions, which the BPU found relied upon "assumptions that are plainly incorrect."

PSE&G's period and rate of reductions comply with the Act. The RA's alternative was considered by the BPU, as were its comments on Stipulation I. The RA was not denied procedural due process in the matter and, in reality, is challenging the substance of the BPU's decision.

IV-B 3. THE USE OF DEFERRED ACCOUNTING TO ACHIEVE STATUTORY RATE REDUCTIONS.

Stipulation I proposed that the actual costs related to the SBC (social programs, nuclear plant decommissioning, demand side management program, manufactured gas plant

remediation, consumer education) and any fluctuation in the above-market costs of the Nonutility Generation Market Transition Charge (NTC) be subject to deferred accounting. Deferred accounting allows a regulated entity to defer on its books, rather than write off, certain expenses, based on a regulator's promise to allow recovery at a later date. The BPU accepted this deferred accounting procedure for SBC and NTC charges.

The reasonableness of the BPU's decision will be discussed in Issue V(D). For nor we need only note that, under the Final Decision, PSE&G has been ordered to make the statutorily mandated reductions, and there is nothing in the Act to prohibit deferred accounting. In fact, under N.J.S.A. 48:3-57(b)(3), the BPU

> may devise an alternative accounting or cost recovery process that permits an electric public utility . . . to provide basic generation service to its customers during the period that the electric public utility is providing for sustainable rate reductions . . . if the board determines that such process is necessary to mitigate the impacts of market price fluctuations and to sustain such rate reductions.

Thus, the BPU statutorily has the discretion to authorize such alternative accounting methods as it deems necessary. The Supreme Court has held that hearings are not needed on such discretionary accounting decisions. In re Jersey Central Power & Light Co., 85 N.J. 520, 528 (1981) (holding that the BPU acted within its discretion in accelerating amortization of electric utility's deferred energy account, which did not result in a rate increase, despite the lack of notice or hearings). Although traditional due process was not required for the deferred accounting decision, the RA did receive the essential requirements of notice and an opportunity to be heard when it was permitted to submit comments on Stipulation I.

IV C. THE BPU DID NOT INAPPROPRIATELY RELY ON A DOCUMENT OUTSIDE THE RECORD.

The document in issue is "PSE&G Stranded Cost Calculations," dated November 6, 1998 which was commissioned by the BPU staff and prepared by the independent auditors, ICF. The circumstances which led to its preparation were as follows: On August 17, 1998 in his Initial Decision, the ALJ made various recommendations on stranded cost recovery adjustments but found it "impossible to determine a specific stranded cost amount for the Board's consideration" and advised it would be "most appropriate for the parties to confer on this issue and submit to the Board for its review a stranded cost figure that incorporates my findings and recommendations."

On September 23, 1998 the BPU staff convened a conference for that purpose. The parties could not agree on the quantification of stranded costs. The BPU staff then commissioned the ICF report. On October 2, 1998 the RA submitted its exceptions to the ALJ's Initial Decision, which included its preliminary calculation that the ALJ's decision would result in stranded costs totaling $3.407 billion. In PSE&G's exceptions, it noted that its calculation of stranded costs based on the ALJ's suggested adjustments totaled $3.7 billion. On October 30, 199B the RA submitted its reply to PSE&G's exceptions, standing by its stranded cost calculation and noting that the BPU "may modify several of the ALJ's recommendations," rendering any quantification moot. For that and other reasons, the RA believed that any of the parties' "attempts to reduce the ALJ's decision into a discrete stranded cost figure is somewhat arbitrary and should not necessarily be Belied upon by the Board." The ICF report offered three different calculations based on different inflation rates, arriving at stranded cost valuations of $2.485 billion, $2.949 billion, and $3.310 billion.

On November 18, 1998 the Attorney General's office sent the ICF report to the parties, including the RA and the BPU Commissioner. In the cover letter, the deputy attorney

general stated that the stranded costs calculation "represents the best interpretation and quantification of the ALJ's Initial Decision" by ICF, but that the "quantification does not necessarily represent the position of the BPU staff." The letter also stated that the report was submitted "for your information." The DAG's letter did not specifically invite or preclude written comments. No responses were received.

In Stipulation I, PSE&G proposed stranded costs totaling $3.3 billion. In Stipulation II, the RA proposed stranded costs totaling $2.8 billion. The parties submitted written comments on the stipulations.

In its Final Decision, the BPU adopted the ALJ's decision as to adjustments for stranded costs and accepted "as reasonable" ICF's mid-range quantification of stranded costs based on the ALJ's decision, $2.949 billion, a compromise sum. However, the BPU made one minor modification to account for emission credits and lowered the figure to $2.94 billion for net-of-tax stranded costs.

In support of the contention that it was improper for the BPU to rely on the ICF report, because it was not formally admitted into evidence at the hearing, the RA cites In re Parlow, 192 N.J. Super. 247, 249 (App. Div. 1983). In Parlow we held that the Civil Service Commission improperly relied on an employee's service record, which was not admitted into evidence before the ALJ, in rejecting the ALJ's decision. We observed that there was no notice to the parties or opportunity for rebuttal. In response to Parlow the BPU says that there is nothing improper about relying on the assistance of staff or consultants, citing for support In re Allegations of Violations of Law and Admin. Code by A. Fiore & Sons, Inc., 94 N.J.A.R.2d 175, 195-96 (EPE 1994), rev'd in part on other grounds, 96 N.J.A.R.2d 305 (EPE1996). There the respondents objected to the ALJ directing the staff of the BPU to calculate penalty and refunds in accordance with his findings, after the close of the record. The Commissioner of the Department of Environmental Protection and Energy said that the "ALJ's directive is unobjectionable

and, indeed, commonplace. The Staff did not engage in ex parte activity, but "merely performed a ministerial task at the direction of the ALJ."

Of course, preparation of the ICF report was more than a merely ministerial task. However, unlike in Parlow, the parties were given copies of the document and knew it was prepared precisely in order to help the BPU quantify PSE&G's stranded costs. Although written comments were not requested, nothing prevented the RA from responding to this critical report. The Final Decision was not entered until August 1999, ten months later, so there was ample time and opportunity to respond. In fact, the report most certainly was considered by the parties in arriving at their own calculations of stranded costs for their stipulations, which were prepared in March 1999, four months after the ICF report was sent to them.

Because the RA had notice of the ICF report and an opportunity to respond to it, we conclude that the BPU's reliance on the report was not a procedural irregularity sufficient to deny the RA due process. It was neither fundamentally unfair, nor rose to the level required under N.J.S.A. 48:2-46 for setting aside the order.

IV. D. THE BPU NEED NOT HAVE CONDUCTED HEARINGS ON SECURITIZATION.

The RA contends that the BPU violated constitutional due process, the APA, and the Act by issuing a decision on securitization without conducting hearings because there were factual issues in dispute and the agency was acting in a quasi-judicial capacity. Relying on the 1998 stranded cost hearings was inappropriate, the RA says, because the 1999 securitization filing raised new issues not addressed therein. Even if hearings were not required, the RA urges it should have been given an opportunity to meet and rebut the expert analysis on which the BPU relied. Also the RA claims PSBSG made two important last-minute revisions to its

financing petition to which the RA did not have an opportunity to respond.

Securitization concerns the structuring and pricing of transition bonds, which are used to reduce stranded costs. Statement on Assembly Bill A-16, comment on section 14. PSE&G filed its financing petition in June 1999, after the hearings on rate unbundling and stranded costs and the BPU's April 21, 1999 summary order, which included the BPU's determination that PS8SG could securitize up to $2.4 billion of its net-of-tax stranded costs. On August 11, 1999 the RA filed comments, raising thirteen issues, including the contention that evidentiary hearings should be held on the matter. On August 24, 1999 the BPU held a public meeting at which it rendered its oral decision that such hearings were not required. On that same day the BPU issued its final decision in the rate unbundling, stranded cost, and restructuring proceedings, which elaborated on its April 21, 1999 summary order.

PSE&G filed revisions to its financing petition on September 2 and 10, 1999. According to the BPU, it actually received a copy of the second revisions on September 9, the day before a public meeting on the matter was held. The BSCRO was entered on September 17, 1999.

The APA provides for hearings in contested cases, N.J.S.A. 52:14B-9(a), which it defines as a proceeding in which "the legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties are required by constitutional right or by statute to be determined by an agency . . . ." N.J.S.A. 52:14B-2(b). The Act does not require evidentiary hearings to be held on BSCROs. N.J.S.A. 48:3-64. In fact, the section of the statute that deals with BSCROs provides that "all proceedings in connection with the determination of bondable stranded costs, transition bond charges and bondable stranded costs rate orders shall be exempt from the provisions of Title 48 [Public Utilities] of the Revised Statutes and any regulations promulgated thereunder." N.J.S.A. 48:3-64(f). N.J.S.A. 48:3-64(a) refers

back to N.J.S.A. 48:3-62, the section on stranded cost recovery and transition bonds, which does not mention a hearing requirement. N.J.S.A. 48:3-64(a) does not refer back to N.J.S.A. 48:3-61, which requires hearings after the utility submits a stranded cost filing in order to establish a market transition charge. N.J.S.A. 48:3-61(c). After such hearings, the BPU must issue a stranded cost recovery order; but it may also issue a "successor order" setting forth the mechanism by which the utility will recover stranded costs. N.J.S.A. 48:3-61(c). The BPU persuasively characterizes the BSCRO at issue here as a successor order to its earlier restructuring order of April 21, 1999.

Even if a hearing is not required under the Act or the APA, it may be required by constitutional right if there are "material disputed adjudicative facts" at issue. Frank v. Ivy Club, 120 N.J. 73, 98 (1990), cert. denied, 498 U.S. 1073, 111 S. Ct. 799, 112 L. Ed.2d 860 (1991) (emphasis added). To support its assertion that there were numerous material factual issues in dispute, the RA points to the extensive discovery conducted by the BPU and the RA and the issues it raised in its August 11, 1999 comments. However, those issues involved policy decisions, such as the percentage of stranded costs to securitize, whether to have an MTC tax approved as part of the BSCRO, and legal decisions, such as whether aspects of the petition violate the Act. Such quasi-legislative decision making does not require trial-type hearings. High Horizons Dev. Co. v. Department of Transp., 120 N.J. 40, 51 (1990). Furthermore, the establishment of an MTC tax was suggested by the RA in comments on Stipulation I. Most of the purely adjudicative facts had already been dealt with in the hearings held on unbundled rates, stranded costs, and restructuring; e.g., the amount of stranded costs which would be securitized.

In its September 17, 1999 decision on the RA's comments, the BPU stressed, as it does again here, that the RA did not submit an affidavit setting forth the specific facts demonstrating that there were genuine issues requiring an

evidentiary hearing. See Frank, 120 N.J. at 99. The RA now points specifically to the "mechanics of recovery" of the MTC tax as a factual issue requiring evidentiary exploration. However, the factual question as to the amount of stranded costs and how much that figure would be when "grossed up" for taxes was decided in the stranded cost proceedings; at the securitization stage the question was one of methodology. This did not require trial-type hearings.

Although requisite due process is required, informal procedures may satisfy that requirement as long as the parties had "adequate notice, a chance to know opposing evidence, and to present evidence and argument in response." High Horizons, 120 N.J. at 53. Here, the RA had notice of PSE&G's financing petition, was given an opportunity to engage in discovery and comment on the petition, and to attend the public meeting on the petition. Although the MTC tax and the mechanics of its recovery may not have been addressed during the stranded cost hearings, the RA itself suggested the mechanism when commenting on Stipulation I, the BPU established the MTC tax in the Final Decision, and PSE&G included it in its financing petition, on which the RA commented. Thus, the essentials of due process were satisfied.

Even when adjudicative hearings are not required, agencies are not permitted to act on undisclosed evidence which parties have not had an opportunity to rebut. Ibid. The RA contends that the BPU adopted PSESG's September 2 and 10, 1999 revisions without giving it an opportunity to respond. The September 2, 1999 attachment is a computation of ratepayer savings for the fifteen-year period of the transition bonds, and the September 10, 1999 attachment is a revision of supporting schedules, which affect rate reductions and the level of TBC and MTC tax charges over the course of fifteen years. The RA acknowledges it received a copy of the September 2 submission and had an opportunity to respond to the submission before the September 10 public meeting. However, as to the September 10 submission, even the BPU

admits that there was no time for the RA to review and respond to it, although the BPU staff did have a chance to "consider it and reject it." Comparison of the September 10 submission and the attachment to the September 17, 1999 BSCRO supports the BPU's assertion that it did not rely on the September 10 submission or did not use the same figures as reflected in that submission. Since the BPU did not substantively consider the late submission, the RA cannot effectively complain that the agency acted on undisclosed evidence. We conclude that the BPU acted within its discretion by relying on the stranded cost hearings and the comment process in the securitization proceedings.

IV E. THE BPU PROPERLY DENIED NJBUS INTERVENTION IN THE SECURITIZATION PROCEEDINGS.

NJBUS contends that the BPU erred in rejecting its petition to intervene in the securitization proceedings. NJBUS claims its members have a significant stake in the outcome of the proceedings, their interest is markedly different from the interests of other parties, and they have considerable expertise and experience in utility regulation matters.

The standards for intervention in an administrative proceeding are governed by N.J.A.C. 1:1-16.3. Under that regulation, these factors are considered:

> the nature and extent of the movant's interest in the outcome of the case, whether or not the movant's interest is sufficiently different from that of any party so as to add measurably and constructively to the scope of the case, the prospect of confusion or undue delay arising from the movant's inclusion, and other appropriate matters.
>
> [N.J.A.C. 1:1-16.3(a).]

The BPU denied NJBUS's and Co-Steel's motions to intervene in the securitization proceedings because it found

that neither of the parties had satisfied the criteria of N.J.A.C. 1:1-16.3; specifically, they had not shown that they had special expertise on the matter of the structuring and pricing of transition bonds.

NJBUS was an active participant in the rate unbundling, stranded costs, and restructuring proceedings, presenting affidavits and testimony of numerous witnesses. As a representative of large business users of electricity, their expertise was useful in those proceedings. However, once the amount of stranded costs recoverable was determined, the matters to be resolved in the securitization proceedings -- how to structure, market, sell, and issue transition bonds -- required the type of technical financial expertise available from the BPU's financial adviser, Bear Sterns and Co. NJBUS does not offer any specific way it could have helped in these proceedings. Furthermore, the BPU had the input of the RA, which vigorously represents consumers of electricity in the State. The BPU did not abuse its discretion rejecting NJBUS's motion to intervene.

IV F. CONCLUSION.

The administrative actions in this case were the culmination of an unusual hybrid of quasi-adjudicative and quasi-legislative proceedings. The short time period in which the Act mandated introduction of retail competition and rate reductions was in very substantial part responsible for any departure from the standard fare of hearings and rulemaking. However, we unhesitatingly conclude the essential requirements of due process were provided to the parties throughout the hearings, comment periods, and settlement negotiations. None of the procedural irregularities alleged by the parties rise to the level of a denial of constitutional due process, a violation of the APA, or of the Act. The proceedings were marked by full and vigorous participation, reflecting the full range of both public and special interests.

V

FACT-FINDING DISPUTES.

The RA and NJBUS challenge several aspects of the BPU's Final Decision as unsupported by the evidence and arbitrary. They allege that (l) the BPU's valuation of generation-related assets for the GENCO transfer failed to reflect full market value of the assets, (2) the shopping credits established by the BPU were not high enough to foster competition, (3) PSE&G's reliance on deferred accounting violated the Act, (4) PSE&G's use of excess depreciation reserve funds to achieve rate reductions is inconsistent with the Act, (5) the BPU allowed PSE&G to securitize more than the 75% of stranded costs allowed under the Act, and (6) PSE&G failed to pass through to customers all savings from securitization.

An appellate court will not reverse a decision of an administrative agency unless it is arbitrary, capricious, or unreasonable or it is not supported by substantial credible evidence in the record as a whole. Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980). In determining whether an agency decision is based on sufficient credible evidence, this court gives "due regard" to the agency's expertise when this is a factor. In re Taylor, 158 N.J. 644, 656 (1999).

V A. THE VALUATION OF GENERATION-RELATED ASSETS FOR THE GENCO TRANSFER.

The RA and NJBUS contend that the BPU violated the Act by allowing PSE&G to transfer its generating assets to GBNCO at an amount below full market value, which led to higher stranded costs eligible for recovery from customers. They claim that instead of relying on an administrative estimate based on predictions of future electric market prices, the BPU should have based its calculation on post-hearing out-of-state sales of comparable electric generation plants in the national market. They also contend that the BPU did not include a valuation for PSE&G's generation-related assets,

such as fuel supplies and contracts. Finally, the RA faults the BPU for waiving the procedural requirement of petitioning for a transfer of assets and NJBUS faults the BPU for allowing the transfer of assets before promulgation of regulations on such transfers.

N.J.S.A. 48:3-55(d) permits the transfer of an electric utility's assets to an affiliate at "full value," which is to be determined by the BPU:

> Pursuant to rules and regulations to be adopted by the board, the transfer of electric public utility assets from an electric public utility to a related competitive business segment of that electric public utility or of a public utility holding company, other than in the ordinary course of business, shall require board approval, and shall be recorded at full value as determined by the board.

The market value of generating assets that are transferred to an affiliate directly affects the quantification of stranded costs:

> For the purposes of quantifying the magnitude of stranded costs eligible for recovery via the market transition charge, the board shall require the electric public utility to demonstrate the full market value of each eligible generating asset or power purchase commitment over its remaining useful life or term and, fixing the level of the market transition charge, the board shall reach a determination as to the market value of such eligible assets and commitments, or implement a mechanism for such value to be determined.
>
> [N.J.S.A. 48:3-61(e).]

The electric utility has a duty to mitigate stranded costs by, among other things, obtaining the highest market value of its generating assets:

> For the purposes of quantifying the magnitude of stranded costs eligible for recovery via the market transition charge, the board shall require or impute all reasonably available measures for the electric public utility to mitigate the quantity of stranded costs, by: . . . (2) Maximizing the market value of the generating asset or purchase commitment.
>
> [N.J.S.A. 48:3-61(f)(2).]

The Act does not specify what methodology should be used in determining the value of assets to be transferred to an affiliate.

At the OAL proceedings, because PSE&G was not yet proposing immediate transfer of its generation assets to an affiliate, the value of those assets was litigated in the context of determining the amount of stranded costs PSE&G could recover for each of its generating plants. In his Initial Decision, the ALJ discussed the "administrative estimate" method of quantifying the market value of generation assets, which was relied on by PSESG and most of the intervenors:

> Absent divestiture, an administrative determination must be made to arrive at a quantification of stranded costs. The Company's methodology, which was broadly followed by all intervenors in their studies, was premised on the fact that market value can be estimated administratively by utilizing a market price forecast. The forecasted market energy price and capacity price, applied to the forecasted output of particular generating assets, is used to derive a projected market revenue of each facility on an annual basis. Forecasted annual cash expenditures including fuel, operation and maintenance (O & M) expenses, capital additions, taxes, administrative and general expenses and other ancillary costs are then subtracted from the projected annual market revenues. A comparable analysis is performed for

> each generating facility, as well as for each power purchase agreement with NUG contractors. The net results are discounted back to the present value using a discount rate of 8.42 percent, this value being based upon the Company's 1992 cost of capital, using the Company's capital structure provided in the last base rate case.

The ALJ then discussed the exceptions taken to this methodology by the RA, Enron, and the BPU's auditors, including those testified to by Michael Dirmeier on behalf of the RA, and PSESG's responses to those exceptions. The ALJ agreed to some of the points made by the RA, Enron, and the BPU staff, and he recommended that certain adjustments be made to PSE&G's forecast assumptions.

In its Final Decision, in response to arguments of some of the parties, the BPU found that it was not necessary to reopen the proceedings and take additional evidence on recent sales of generating assets in other states, due to the extensive hearings already held on the valuation issue and the lack of direct relevance of those sales, somewhat "instructive" though they might be:

> With respect to the valuation of the assets being transferred, there is a direct link between the value assigned these assets with respect to the transfer, and the magnitude of PSE&G's stranded costs: the higher the assigned value, the lower the remaining stranded costs. The issue of the value of PSE&G's generation assets was litigated at length in the stranded cost proceeding, as described in the Initial Decision and summarized hereinabove. Extensive testimony with respect to both the proper net book value of the assets to be utilized for purposes of stranded costs, as well as the net present value cash flows forecasted to be generated by the generation facilities over their remaining lives was presented in evidence at the Office of Administrative Law. The discounted net cash flow

analysis approach, which was utilized by PSE&G in its stranded cost calculation and utilized as well by other parties' witnesses in the case (albeit with different assumptions) represents an analysis that would be undertaken by a potential bidder to determine its offering price in an asset auction process. The ALJ weighed the arguments and rendered findings with respect to the various inputs, variables and assumptions underlying a discounted cash flow analysis, including market energy and capacity price forecasts, forecasted capital additions and operation and maintenance costs, unit output and rates of return. We FIND that additional hearings are not required on this issue because there is sufficient basis in the record for a determination of the value of PSE&G's generation assets, and we FURTHER FIND that all parties have had ample opportunity during the proceedings to advance their arguments and introduce evidence with respect to the value of these assets.

As summarized above, in the comments on the proposed Stipulation, a number of parties urged the Board to consider the results of various recent fossil fuel generation divestitures through the country, arguing that recent data indicates that, when put up for sale and competitive bid, electric utility fossil fuel generation has fetched prices in excess of book value. While generation trends as to the results of industry-wide asset sales may be somewhat instructive and while, as discussed below, we have considered them and taken them into account in our decision, we concur with the comments received from PSE&G that it is impossible to reasonably attempt to extrapolate PSE&G's asset values from the results from sales of other utilities' generating assets. Any number of unique and individual factors associated with a particular utility's assets may exist which would justify divergent outcomes

> or plant values. These factors include plant vintage and conditions, heat rates, location, state and/or local environmental regulations or restrictions, environmental liabilities, fuel restrictions, fuel commodity and transportation costs, labor agreements, state and/or local tax liabilities and market price conditions. These factors, as they apply specifically to PSE&G's assets, were included in this proceeding as part of the stranded cost calculations, as the discounted net cash flow analyses prepared by PSE&G and several other parties considered all future costs and revenues associated specifically with each individual PSE&G generating facility. A proposed analysis to bring the purported comparable sales into comparability was not offered by the proponents of Stipulation II, nor is it likely that such an analysis could be readily performed. We FIND, for the foregoing reasons, that it would be unreasonable to rely upon these recent sales as the basis for a determination of the value of PSE&G's generating assets. We FURTHER FIND that there is ample support in the record for the Board to determine the market value of PSE&G's generating assets, and that the discounted net cash flow analyses presented in the stranded cost proceeding are the appropriate mechanism to be utilized to render such a determination.

However, the BPU did rely on recent industry divestiture information in deciding that the market value of PSE&G's generating assets was $135 million more than the company proposed in Stipulation I:

> [W]e HEREBY FIND the level of net-of-tax owned generation stranded cost for PSE&G to be $2.94 billion. This amount, when compared to the level of net-of-tax stranded costs which PSE&G would be afforded the opportunity to recover via the

> proposed Stipulation ($3.075 billion), results in a reduction to net-of-tax stranded cost recovery of $135 million. This decrease of $135 million in net-of-tax stranded cost vis-a-vis the level proposed in the Stipulation represents a finding by the Board that the market value of PSE&G's owned generation assets is $135 million more than that assumed in the Stipulation. The comments received in response to the Stipulation, regarding recent industry divestiture information, would suggest that this increased value, vis-a-vis the Stipulation, should be assigned to the Company's fossil fuel generating units, since these types of units, as opposed to nuclear generating facilities, have obtained sales premiums. We therefore FIND, consistent with the general industry trends which have been noted in a number of the comments received, that the transfer value of the Company's fossil generating assets should be increased by $135 million. Accordingly, we FIND that the generating assets shall be transferred to Genco at the following market valuations: $0.046 billion for nuclear; and $1.857 billion for fossil. Thus, the full value of the generating asset transfer is $1.903 billion, in satisfaction of the requirements of subsection 7(d) of the Act, N.J.S.A. 48:3-55(d), which we FIND to be the full market value of the generating assets over their remaining useful life in accordance with the provision of subsection 13(e) of the Act, N.J.S.A. 48:3-61(e).

In addition to the $1.903 billion valuation of the generating assets that PSE&G will transfer to GENCO, the BPU allowed PSE&G to recover up to $540 million more in stranded costs (reduced from the $600 million proposed in Stipulation I) through an MTC, which the BPU referred to as a "transfer premium". The BPU calculated this as the difference between the $2.94 billion in total net-of-tax stranded costs and the $2.4 billion that it would permit PSE&G to securitize.

However, as NJBUS points out, $540 million is also the difference between the $1.903 billion asset valuation and the $2.443 billion referred to later in the Final Decision as the "final and fixed transfer value . . . which is the fair market value of the assets transferred considering all revenues derived from the BGS contract [between PSE&G and GENCO]." The BPU asserts that this reference to $2.443 billion was "merely intended to adjust the number contained in Attachment 4 [to Stipulation I] downward to reflect the fact that the BPU had reduced the 'transfer premium' included in Attachment 4 from $600 million to $540 million." Attachment 4, titled "Generation Fixed Transfer Value," consists of the following computation:

$5.058 billion	Net After Tax Book Value
(3.300)	Stranded Cost
$1.768*	Transfer Value
$ 600	MTC
$2.368	Amount Paid by Genco to PSE&G

*Plus Generation-Related Assets, including Nuclear Fuel and Materials & Supplies at Book Value.

Thus, $1.903 billion in transfer value of assets plus $540 million in MTC equals $2.443 billion, the amount paid by GENCO to PSE&G. However, we do not think that this calculation has any effect on the parties' challenge to the transfer premium.

Essentially, the RA and NJBUS argue that there is no justification for a transfer premium. The BPU justifies the $540 million transfer premium by saying that it benefits PSE&G's customers by allowing the utility to recover its stranded costs but transferring the risk of nonrecovery of stranded costs to GENCO:

> These funds shall be used by PSE&G, much like the proceeds from the transition bonds, to refinance and/or retire its debt and/or equity. This will benefit the utility and, ultimately, the customers of PSE&G by further reducing PSE&G's cost of capital.

> PSE&G will have the opportunity to recover up to $540 million, net-of-tax, through any retained retail adder associated with non-switching or returning customers, the MTC (exclusive of the NTC and the MTC-Tax) and the amount funded by the excess distribution reserve amortization; which funds will be, in turn, transferred to Genco as received pursuant to the terms of the BGS contract (as modified and approved herein). At the end of the Transition Period, the recovery of the $540 million will be reconciled with actual collections as set forth herein, with PSE&G being at risk for any shortfall and customers receiving the benefit of any overrecovery via a credit of such excess amount to the SBC. We FIND this mechanism to be consistent with the provisions of section 13 of the Act, N.J.S.A. 48:3-61, which require that we afford the utility the opportunity, but not a guarantee, for recovery of generation-related stranded costs, and that . . . we reconcile stranded cost recoveries to ensure that the utility will not collect in excess of its stranded costs. The above-described mechanism has the added benefit of transferring the risk of nonrecovery of stranded costs to Genco, the unregulated affiliate, and not the utility, since PSE&G will receive the $540 million from Genco up-front in the form of a transfer premium.

The BPU's decision to make its fact findings as to asset valuation based on the "administrative estimate" method used by the parties during OAL proceedings and approved of by the ALJ was reasonable. The BPU explained its reasons for adopting the methodology and there is absolutely no doubt there was substantial evidence in the record to support its findings on valuation based on that method. In re PSE&G Co., 304 N.J. Super. at 273-74. Whether to reopen the proceedings in order to consider new evidence of speculative relevance regarding the sale of generating assets in other states was within the BPU's sound discretion. N.J.A.C. 14:1-

8.4(b).[2] Considering the time-consumption and difficulty of extrapolating useful comparable information from out-of-state transactions, the rather insubstantial offer of proof (see R. 1:7-3), and the compressed time frame within which the BPU had to proceed to implement the Act, we conclude that the BPU did not abuse its discretion in refusing to reopen the proceedings on asset valuation.

NJBUS cites In re MCI Telecom. Corp., 263 N.J. super. 313, 318 (App. Div. 1993), in support of its position that the BPU may not ignore significant new developments in reaching its decision. That case involved the rejection of a petition which re-examined the subject of local competition for the first time in six years, at a time when the telecommunications industry had changed drastically, and when the original decision had been based on little hard evidence. Here, there was ample evidence on which to forecast the value of assets using an approved methodology. The out-of-state market-price evidence in fact was considered by the BPU and resulted in a $135 million increase in the transfer value of some of PSE&G's assets.

The BPU's decision to allow recovery of the $540 million in stranded costs through an MTC must be treated with deference because, as the administrative agency charged with enforcing the Act, its interpretation of the Act and its policy decision should be given great weight. Nelson v. Board of Educ. of Tp. of Old Bridge, 148 N.J. 358, 364 (1997); see Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844, 104 S. Ct. 694, 81 L. Ed.2d 694, 703 (1984) ("[C]onsiderable weight should be accorded to an executive department's construction of a statutory

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[2] N.J.A.C. 14:1-8.4(b) states:

> If, after the hearing in a proceeding, the Board shall have reason to believe that conditions of fact or of law have so changed as to require, or that the public interest requires, the reopening of such hearing, the Board will issue an order for the reopening of same.

scheme it is entrusted to administer, and the principle of deference to administrative interpretations"). The Act allows for, but does not mandate, a utility's full recovery of its stranded costs. The MTC is one mechanism for recovering stranded costs. The Final Decision allows for a true-up at the end of the transition period so that PSE&G will not be able to recover more than its stranded costs in violation of the Act. We see no basis for overturning this aspect of the decision.

The RA also asserts, based on the calculations in Attachment 4 to Stipulation I, that the BPU's asset valuation is mathematically inconsistent and arbitrary. As the RA says, the BPU did not make an independent determination of the net-after-tax book value of its generating assets and did not modify the $5.068 billion figure asserted by PSE&G. The RA goes through a series of calculations, but the crux of its argument is that the market value of $1.903 billion, plus stranded costs of $2.94 billion, should add up to the net book value of $5.068 billion; but they add up to only $4.843 billion, $225 million less than $5.068 billion. In Attachment 4, the transfer value proposed by PSE&G ($1.768 billion) and the stranded cost figure it proposed ($3.300 billion) did indeed add up to $5.068 billion. The BPU does not address this discrepancy in its brief but PSE&G explains it by pointing out that in Stipulation I PSE&G agreed to a total reduction of $225 million in unsecuritized generation-related stranded costs. The RA did not respond to this explanation in its reply brief, presumably conceding the validity of the explanation.

Both the RA and NJBUS fault the BPU for ordering the transfer of generation-related assets such as contracts, materials, and fuel at book value rather than fair market value and without any listing of these assets or litigation on them. Stipulation I proposed the transfer of generation-related assets such as "materials, supplies, and fuel" at book value and the BPU adopted the proposal in its Final Decision:

> PSE&G will transfer at book value at the time of transfer other generation-related assets including

> materials, supplies, and fuel, which book value we find to be the full value for such generation-related assets in accordance with subsection of the Act, N.J.S.A. 48:3-55(d). Such transfer prices ensure that PSE&G receives full value for the Generation Facilities and related assets and that PSE&G will not retain any liabilities associated with the transferred Generation Facilities or other generation-related assets and shall assure that customers' responsibility for stranded costs is established at the lowest reasonable level.
>
> [(emphasis added).]

N.J.S.A. 48:3-55(d) gives the BPU the discretion to determine the full value of assets, and the BPU determined that the book value of these types of assets was their full value. The RA had an adequate opportunity to comment on this aspect of the transfer at book value.

However, the BPU adopted another aspect of Stipulation I, that regarding the transfer of generation-related contracts to GENCO, without comment as to any inherent value of the contracts:

> In order to ensure that PSE&G does not retain any risk or liabilities associated with the electric generating business after the Generating Facilities have been transferred, the Board hereby orders that all contracts (except for the NUG contracts) associated with the electric generating business, including, but not limited to, wholesale electric purchase and sales agreements, fuel contracts, real and personal property interests, and other contractual rights and liabilities, be transferred from PSE&G to Genco simultaneous with the transfer of all generating assets, and to substitute the Genco for PSE&G as the party(s) to any such contracts.

PSE&G does not explain why the contracts should be transferred without a valuation. The BPU states that it is

"reasonable to assume that contracts and rights related to generating assets would be made available to potential purchasers of those assets at book value" despite the fact that *the Final Decision does not state that the contracts will be* transferred at book value. No one seemed to propose that any of the contracts were intrinsically valuable. We are not convinced by anything in this record that any generation related contracts had any measurable intrinsic net value. Indeed, some could become a decided liability, depending on market fluctuations.

We now turn to the purely procedural aspects of appellants' arguments. The RA contends that the BPU violated N.J.A.C. 14:1-5.6 when it waived this regulation's requirement that PSE&G petition it for approval to sell its generating property to GENCO. The only reference to this regulation in the Final Decision was as follows:

> The advertising requirements under N.J.A.C. 14:1-5.6 are waived because of the extensive nature of the record regarding valuation of the assets being transferred and no further authorizations by the Board are required to effectuate this transfer provided that all other regulatory approvals are obtained on a basis consistent with this Order.

The advertising requirements referred to above are in N.J.A.C. 14:1-5.6(b): property worth over $500,000 must be advertised for sale at least twice in the county in which it is located. Those requirements may be waived, under N.J.A.C. 14:1-5.6(i). In addition, under N.J.A.C. 14:1-1.2(a), procedural regulations may be relaxed for good cause and the rules are to be liberally construed so as "to permit the Board to effectively carry out its statutory functions and to secure just and expeditious determinations of issues properly presented to the Board." Here, when the BPU said that it was waiving the advertising requirements of N.J.A.C. 14:1-5.6, "due to the extensive nature of the record regarding valuation of the assets being transferred," it was obviously explaining why none of the petition requirements of that regulation were

required, rather than just the advertising requirement of section (b). Stipulation I was, in effect, a proxy petition for the BPU's approval of the transfer of assets. The BPU did not *abuse its discretion in waiving the petition requirement.*

In its reply brief, NJBUS raises for the first time the contention that N.J.S.A. 48:3-55(d) requires the BPU to promulgate regulations regarding valuation of asset transfers to an affiliate before it approves any such transfers.. N.J.S.A. 48:3-55(d) provides that "pursuant to rules and regulations to be adopted by the board," the transfer of a utility's assets to an affiliate "shall require board approval."

The purpose of rulemaking is to give the public notice of anticipated agency action and an opportunity to participate and comment on the action before it becomes final, as well as to give the agency the benefit of the information that the public has to offer. Metromedia, Inc. v. Division of Taxation, 97 N.J. 313, 331 (1984). Here, over thirty intensely interested intervenors of all stripes had an opportunity to participate in the OAL proceedings, at which PSE&G's generating assets were valued for stranded cost purposes, and then by commenting on Stipulation I, which proposed the immediate transfer of generating assets. NJBUS has shown no harm by the BPU's approval of the transfer without first adopting regulations. Yahnel v. Board of Adjustment of Jamesburg, 76 N.J. Super. 546, 550 (Law Div. 1962), aff'd, 79 N.J. Super. 509 (App. Div.), certif. denied, 41 N.J. 116 (1963) (holding that Board's granting of variance without first adopting statutorily required rules did not invalidate Board's action when plaintiffs failed to show how they were harmed by the failure to adopt rules and they had a full opportunity to present their case to the Board). NJBUS also had the full opportunity to present its case.

V B. THE SHOPPING CREDITS

"Shopping credits" are the amount deducted from customers' electric bills when they switch to a nonutility supplier for their basic generation service. N.J.S.A. 48:3-51.

NJBUS contends that the level of shopping credits approved by the BPU is too low to encourage competition, their purpose under the Act. It faults the BPU for setting the credits at the same level as established by the Philadelphia Electric Company (PECO), citing a witness who testified that the market forces which made PECO shopping credits acceptable in 1998 had changed by 1999. Therefore, NJBUS asserts BPU's decision, which relied on out-of-date market data from a contiguous state, was arbitrary, capricious, and unreasonable, and a remand is required in order to develop a record which will result in more reliable forecasts of energy prices.

Under N.J.S.A. 48:3-52(b), electric utilities that provide basic generation service must also provide

> shopping credits applicable to the bills of their retail customers who choose to purchase electric generation service from a duly licensed electric power supplier. The board shall determine the appropriate level of shopping credits for each electric public utility in a manner consistent with the findings and declarations of the Legislature . . . . The reduction in electric public utility rates . . . shall be consistent with the goals of the act, including the creation of shopping credits . . . .

Among the policies advanced in the legislative findings and declarations section of the Act are lowering the cost of energy and fostering diversity in the supply of electric power by opening New Jersey to competitive markets. N.J.S.A. 48:3-50(a)(1), (2), and (7). N.J.S.A. 48:3-52(b) gives the BPU the discretion to determine the level of shopping credits which will encourage competition and will relate appropriately to the level of rate reductions.

In Stipulation I, PSE&G proposed shopping credits averaging 5.03 cents per kWh in 2000, rising to 5.10 cents per kWh in 2003. In Stipulation II, NJBUS and the other signatories proposed shopping credits averaging 5.40 cents

per kWh in 2000, based on the alleged PECO level of shopping credits, with adjustments for New Jersey costs and cost increases in the wholesale market. In an affidavit attached to Stipulation II on behalf of MAPSA, John Rohrbach, who was involved in the PECO rate-setting negotiations, said that "the underlying market forces that made PECO Shopping Credits acceptable have changed considerably since April 1998," when the PECO settlement was signed. He pointed specifically to higher energy prices. He also mentioned higher taxes in New Jersey. Rohrbach acknowledged that PSESG's proposed shopping credit level was higher than PECO's, but said that on "a real basis" they were lower and insufficient to support a truly competitive retail market.

The BPU adopted the shopping credit proposal in Stipulation I. In its Final Decision the BPU first emphasized the interrelated character of the level of rate reductions and shopping credits:

> [U]nder a price cap as mandated by the Act, once the other unbundled rate components, including provisions for stranded cost recovery, are established, higher shopping credits would result in lesser rate reductions, and vice versa, absent the deferral of the recovery of costs into some future period. In a very real sense then, the Board is required by the Act to balance the achievement of two crucial, yet potentially conflicting factors. All other things being equal, a movement too far in one direction, in favor of larger shopping credits at the expense of lesser rate reductions, would benefit electric power suppliers and/or shopping customers, at the expense of customers who do not switch suppliers. Conversely, a move too far in the other direction in favor of lower shopping credits to achieve higher rate reductions would benefit non-shopping customers, while potentially inhibiting the development of a competitive market by making it

> less attractive for third party suppliers to enter the marketplace, thus resulting in diminished opportunities for customers to switch suppliers.

After establishing the level of rate reductions during the four-year transition period, the BPU turned to the level of shopping credits:

> [I]t is plainly evident that the shopping credits embodied in the Stipulation are significantly higher than those proposed by the Company in its filing, and reflect consideration of the criticism leveled at that proposal by the parties to this proceeding, . . . some of which were found to have merit by the ALJ. The proposed shopping credits in the Stipulation reflect market capacity costs, in addition to market energy costs, and also include a retail adder as recommended by the ALJ. The market energy and capacity costs reflected in the shopping credits contained in the Stipulation are consistent with the market price projections presented in the testimony of Company witness Loxley. The shopping credits in the Stipulation also make provision for transmission costs, and the losses and sales tax which will be incurred by third party suppliers. We note that the shopping credits are on par with, and indeed on average slightly higher than those in the PECO service territory in Pennsylvania. These higher shopping credits are noteworthy because, both during the evidentiary proceeding and in comments on the Stipulation, various marketers have pointed to the PECO service territory as having the most robust and active retail electricity marketplace in the nation, and the PECO service territory lies in the same regional electricity marketplace as PSE&G.

The BPU faulted the Stipulation II proposal on shopping credit levels:

> [W]e find that the shopping credits proposed in Stipulation II are excessive, unsupported by the record, and based upon flawed reasoning. First, because of the interrelatedness between shopping credits and the rate reductions, as addressed above, and having established herein the appropriate levels for the other unbundled rate components . . . and having found that Stipulation II's underlying financial analysis is flawed, the level of shopping credits proposed in Stipulation II would lead to either lower rate reductions or a significant deferral of cost recovery, which would lead to higher rates in the future.

The BPU went on to discuss the allegations in Rohrbach's affidavit regarding the comparison to PECO shopping credit levels:

> [W]hile acknowledging that the shopping credits in the Stipulation are higher than those in PECO's territory, the proponents of Stipulation II assert that, on a "real" basis, the credits in the Stipulation are lower, citing asserted changes in the PJM electricity market and differences in costs between Jew Jersey and Pennsylvania. It is asserted in supporting affidavits that the credits in the Stipulation would have to be raised by about 0.6 cents in order to provide a comparable level of competition to that enjoyed by PECO customers. Based on our review of the submissions, the Board concludes that almost all of the claimed differences (approximately 5 of the claimed 6 mill average difference) relate to asserted increases in market prices since the PECO shopping credits were established. We FIND the claim that an increase in the shopping credits to reflect alleged market price increases is necessary in order to provide savings similar to those afforded in the PECO territory to be simply untrue; no provision was made in the PECO decision by the

> Pennsylvania Public Utility Commission ("PaPUC") to update the shopping credits to reflect changed market conditions, as is suggested be done here. To the extent that retail competition is flourishing in PECO's service territory, it is occurring at the fixed levels of shopping credits established by PaPUC in April 1998, despite alleged increases in market price conditions. Moreover, even assuming arguendo, that the cited market prices presented via a post-hearing affidavit are accurate, it is important to note that while the Stipulation's shopping credits are premised on long-term pricing forecasts which have been the subject of substantial review in the proceeding, the proponents of Stipulation II would have the Board premise a decision to set shopping credits for four years based upon a current price condition; however, such price conditions may change daily, if not more often. Accordingly, the Board is not persuaded that it reasonably could or should base its decision on this "snapshot" market information. Rather, we FIND that it is more appropriate to establish the shopping credit levels based upon the market price forecasts over the four year Transition Period which have been presented in this proceeding and which have been the subject of extensive review in the record.

The BPU's acceptance of the proposal in Stipulation I was based on a careful review of the record, including the Rohrbach affidavit. It recognized several important facts: PSE&G had agreed to a higher level of shopping credits than it originally proposed, Stipulation I took into account the ALJ's recommendation that there be a retail "adder" (which represents ancillary costs such as administration and marketing), and the level of shopping credits proposed in Stipulation I was consistent with the PECO level of shopping credits, which successfully had encouraged competition in a nearby geographic area. The BPU observed that PECO

succeeded based on forecasts of energy costs rather than on periodic updates based on actual costs and saw no reason to change that successful formula. There was ample evidence in the record on forecasts during the transition period. Thus, there is nothing arbitrary about the BPU's decision.

V C. PSE&G'S USE OF EXCESS DEPRECIATION RESERVE FUNDS.

The RA contends that the BPU violated the Act when it allowed PSE&G to amortize $568.7 million in excess money it had already collected from its customers to partially fund its statutory rate reduction. The RU says that this contradicts another aspect of the BPU's decision, where it rejected PSB&G's proposal to use $60 million in anticipated overrecovery balance in its levelized energy adjustment clause (LEAC) as of July 31, 1999 to fund part of its rate reduction.

The Act does not specify how the rate reductions are to be achieved or the source of funding for them. N.J.S.A. 48:3-52(d) - (j). It does, however, stale that the reductions should be "sustainable," N.J.S.A. 48:3-52(f), and that the maximum level of rate reduction "shall be sustained at least until the end of the 48th month following [August 1, 1999]." N.J.S.A. 48:3-52(j). The only caveat, but a very substantial one, regarding rate reductions is they should not "impair the electric public utility's financial integrity." N.J.S.A. 48:3-61(h).

Paragraph 4 of Stipulation I proposed:

> The parties agree that an excess electric distribution reserve in the amount of $568.7 million is to be amortized over three years and seven months beginning on January 1, 2000 and ending July 31, 2003. Amortization amounts will be $125 million in the year 2000, $125 million in the year 2001, $135 million in the year 2002, and $183.7 million in the year 2003.

In its Final Decision the BPU adopted this proposal verbatim. Stipulation II, to which the RA was a signatory, proposed that 60% of the $569 million excess depreciation reserve be applied to offset the rate increases it believed would occur in years five and six (2004 and 2005), after the transition period's mandatory rate reductions terminated; only the remaining 40% would be used to fund rate reductions during the four-year transition period. In its comments on Stipulation I, the RA objected to the amortization of electric depreciation reserve funds to fund rate reductions "because it represents excess money that has been collected from ratepayers, which would normally be returned via a reduction in depreciation rates." Yet, at the same time, the RA accepted the use of this money to fund mandatory rate reductions between 1999 and 2003, seemingly contradicting its own position.

In its Final Decision, the BPU said that the use of 60% of the depreciation reserve funds in the fifth and sixth years was "inappropriate, since the $569 million is already embedded in the Company's petition, and fully utilized and relied upon in the ALJ's recommended range of rate reductions, as well as to partially fund the rate reductions." Use of this amortization to fund additional rate reductions would "double-count" the source of funds.

The BPU did agree with the RA's comments regarding the LEAC over-recovery balance as of August 1, 1999 which "consists of funds over-collected from and appropriately returned to the ratepayers of PSE&G, with interest, and thus should be utilized for the benefits of customers, not the Company." The BPU found that the over-recovered amount should offset the NTC deferred balance rather than fund additional rate reductions in years five and beyond, as proposed by the RA. In this way the LEAC monies will be "available to mitigate the impact of recovery of any other deferred costs in year five and beyond."

Thus, the RA explicitly accepted the propriety of the use of depreciation reserve monies to fund rate reductions during

the four-year transition period. Furthermore, the BPU considered the RA's alternate proposal and rejected it based on its finding that it double-counted the depreciation reserve monies. It did not allow the use of LEAC monies to fund rate reductions but there is a difference between LEAC monies, which are normally returned directly to consumers with interest, and excess depreciation funds, which are returned indirectly via a reduction in depreciation rates. The BPU's decision in this regard was within its discretion and did not violate the Act.

V D. PSE&G'S USE OF DEFERRED ACCOUNTING.

As discussed above, in IV B 3, the BPU accepted the Stipulation I proposal that PSE&G be permitted to defer the actual costs related to the SBC and NTC charges. The RA contends that allowing PSE&G to defer these costs to a future time in effect makes any present rate reductions illusory by preordaining that there will be a rate increase after the four-year transition period. Such a rate increase, the RA says, violates that Act's mandate, under N.J.S.A. 48:3-52(f), that the utilities implement a .sustainable aggregate rate reduction." Also, the Final Report specified that utilities could not be guaranteed 100% recovery of stranded costs because the mandatory rate reductions might make that impossible.

As pointed out in V(C) above, there is nothing in the Act which specifies the way in which the rate reductions are to be funded. N.J.S.A. 48:3-52(d). Nor is there anything in the Act that prohibits the use of deferred accounting. In fact, the Act gives the BPU the discretion to permit an "alternative accounting process" which allows a utility to provide basic generating service while effecting rate reductions if the BPU determines that such a process is "necessary to mitigate the impact of market price fluctuations and to sustain such rate reductions." N.J.S.A. 48:3-57(b)(3).

Indeed, deferred accounting is an accepted method where there are fluctuations in costs which must be periodically

adjusted, such as utilities' fuel adjustment clauses. N.J.A.C. 14:12-4.1(b). For example, the LEAC permits utilities to charge customers based on estimates as to future fuel costs and then to make later periodic adjustments to reflect actual costs. In re Atlantic City Elec. Co., 310 N.J. Super. 357, 362 (App. Div. 1998).

Here, in its Final Decision, the BPU considered it appropriate and "consistent with the intent of the Act" to allow PSE&G "to fully recover reasonable and prudent expenditures for the types of programs reflected in the SBC"—the kinds of programs that benefit society, such as environmental, consumer education, and nuclear plant decommissioning. The BPU found that "deferred accounting treatment of under and over-recoveries . . . is necessary and appropriate in order to provide for full recovery [for social programs] under the legislatively required price cap mechanism."

Stipulation I provided for recovery of above-market nonutility generator (NUG) contract costs through an NTC set at an initial level of $183 million annually during the four-year transition period, with the difference between NTC recoveries and the actual above-market NUG contract costs subject to deferred accounting and interest accrual on under or over-recoveries. The BPU found that this mechanism would ensure "timely pass-through" to customers of the benefits of any NUG contract renegotiations, as required under N.J.S.A. 48:3-61; and the "periodic review and adjustment of the charge [would] ensure that the utility will not collect charges that exceed actual stranded costs."

The deferred accounting method for SBC and NTC charges allows for a reconciliation of the estimated and actual costs of these programs, and will benefit customers if there is an over-recovery. The deferral of the actual costs may not necessarily lead to rate increases after 2003, but even if they do, there is nothing in the Act that prohibits such increases. The language in N.J.S.A. 48:3-52(f) regarding a "sustainable aggregate rate reduction" must be read in conjunction with

N.J.S.A. 48:3-52(j), which leads to the conclusion that the rate reductions are only mandated through July 31, 2003. However, the legislative findings make it clear that the Legislature believed that retail competition would lead to competitive rates. N.J.S.A. 48:3-50(b)(5) and (6). We must recall, under N.J.S.A. 48:2-21(d), utilities must file a petition for a rate increase and the BPU may order a hearing before it determines whether to approve any rate increase, an additional safeguard for consumers.

V E. THE BPU DID NOT ALLOW PSE&G TO SECURITIZE MORE THAN THE 75% OF STRANDED COSTS ALLOWED UNDER THE ACT.

N.J.S.A. 48:3-62(c)(1) allows the BPU to authorize securitization "in a principal amount of up to 75 percent of the total amount of the electric public utility's recovery-eligible utility generation plant stranded costs." The BPU authorized PSE&G to issue up to $2.525 billion of fifteen-year transition bonds, which represented $2.4 billion of the $2.94 billion net-of-tax stranded costs ("grossed up" to $4.97 billion to account for federal and state taxes) plus $125 million of transaction costs, which include the fees and expenses of issuing, selling, and refinancing or refunding its debt. According to the BPU, this represented securitization of 48% of PSE&G's total eligible stranded costs. The BPU also allowed the anticipated taxes (about 40% and up) related to securitization -- the amount responsible for grossing up the $2.94 billion figure to $4.97 billion -- to be collected through a separate MTC tax over the course of fifteen years.

The RA contends that the BPU's decision allows PSE&G to securitize 82% of its stranded costs, if the net-of-tax $2.4 billion figure is calculated as a percentage of the net-of-tax $2.94 billion figure. The RA says this violates the purpose of N.J.S.A. 48:3-62(c)(1), which allows for securitization of over 75% of stranded costs only if a utility divests itself voluntarily of its generating plant, thus encouraging divestiture, because PSE&G has not divested but

only transferred its generating facilities to an affiliate. Furthermore, the RA says that the MTC tax is simply a gimmick to circumvent the 75% limit on securitization.

The Act defines "bondable stranded costs" as including the cost of retiring existing debt; federal, state, and local tax liabilities associated with stranded costs; and the costs incurred to issue, service, or refinance transition bonds. N.J.S.A. 48:3-51.. Thus, the BPU did not violate the Act by allowing the transaction costs of $125 million to be securitized. Nor did it violate the Act when it "grossed up" the $2.94 billion net-of-tax figure for total eligible stranded costs and arrived at $4.97 billion as the total that was "bondable." The only perhaps debatable question is whether the $2.4 billion figure is a net-of-tax figure, as the RA claims, and thus should not have been compared to the "grossed up" figure of $4.97 billion to arrive at a percentage of eligibility for securitization purposes.

In its Final Decision, after determining that the $2.94 billion net-of-tax stranded costs should be grossed up so that PSE&G could recover the state and federal income and like tax liability it would incur, the BPU said:

> [W]e concur with the concerns raised by Staff during the litigation of these proceedings, as well as the RPA and others during the comment period, and HEREBY REJECT as inappropriate and, in our view, inconsistent with the intent of the Act, the proposal within the Stipulation, supported by all signatories thereto except NJCU, that all taxes related to securitization be recovered through the transition bond charges. We conclude that the transition bond charge is appropriately utilized to provide and ensure collection of the principal and interest payments on the transition bonds. The assured collection of the bond principal and interest provided via the irrevocable transition bond charge is necessary in order to obtain the highest possible rating on the bonds, which, in turn, will result in the

> lowest possible interest rate on the bonds and resultant maximized ratepayer savings. We do not believe it appropriate, nor consistent with the intent of the Act, that the utilities' tax obligations be collected via the irrevocable transition bond charge. As indicated previously, however, it is entirely appropriate and necessary that the net-of-tax stranded cost number be grossed-up for ratemaking purposes, and that PSE&G be afforded the opportunity to fully recover these taxes.
>
> Accordingly, the Board HEREBY DIRECTS that a Market Transition Charge be established, coincident with the establishment of the transition bond charge, . . specifically for the collection of securitization-related Federal Income and State Corporate Business Taxes ("MTC-Tax"). The taxes to be collected through the MTC-Tax shall reflect the grossed-up revenue requirements associated with the net-of-tax amount of stranded costs, together with the estimated level of transaction costs, authorized herein for recovery through securitization.

Since the securitization-related taxes (responsible for the $2.94 billion figure being grossed up to $4.97 billion) are to be collected through a separate MTC tax, the $2.525 billion that the BPU authorized PSE&G to securitize with transition bonds was a net-of-tax figure. This conclusion is supported by a statement made by the BPU auditors: "If the $2.5 billion securitization is 'grossed up' to include taxes, it becomes a $3.5+ billion securitization issue. PSE&G calculated their stranded cost and their securitization to be net of or without income taxes."

The respondents do not specifically discount that argument, but rather distinguish the funds recovered through securitization from the money recovered through the MTC tax. For example, PSE&G points out that securitization allows it to get the funds immediately and use them to retire debt and

equity capital immediately, whereas the MTC tax gives it access to funds over the fifteen-year life of the transition bonds and the ability use those funds to pay federal and state income taxes as incurred. The unalterable fact remains that PSE&G in reality will securitize only $2.525 billion of its total eligible gross stranded costs (inclusive of local, state and federal taxes) of $4.95 billion or about 51%. This is well below the allowable 75% total.

The BPU apparently and understandably believes it will be better for consumers to allow the federal and state tax liability to be recovered through the MTC tax rather than through securitization. By creating the MTC tax, though not explicitly provided for by the Act but suggested by the RA, the BPU allows PSE&G to recover the tax liability that grossed up the $2.94 billion stranded cost figure to 54.97 billion. We reject the RA's argument that the 52.4 billion actually securitized should be calculated as a percentage of the stranded costs that are not being recovered in some other way, or the net-of-tax figure of $2.94 billion. Doing so leads the RA to the conclusion that the BPU allowed PSE&G to securitize almost 82% of its stranded costs, 7% more than allowed under N.J.S.A. 48:3-62(c).

On this point, we simply disagree with the RA. In this situation the Act permits the BPU to authorize the issuance of transition bonds "up to 75% of the total amount of the electric public utilities recovery-eligible utility generation plant stranded costs," N.J.S.A. 48:3-62(c)(1), as determined by the BPU in accordance with N.J.S.A. 48:3-61. As noted, "bondable stranded costs" includes "federal, state and local tax liabilities associated with stranded costs recovery." N.J.S.A. 48:3-51. We see no violation of the text, purpose or intent of the Act; the total actual securitization is well below the permitted 75% level.

V F. PSE&G HAS PASSED THROUGH TO CUSTOMERS ALL SAVINGS FROM SECURITIZATION.

The RA contends that the BPU has ordered PSE&G to pass along to its customers only those savings associated with the first four years of securitization rather than all savings during the fifteen-year period during which TBC charges will be collected, which violates the Act. As discussed in IV D, above, the RA also faults the BPU for relying on PSE&G's September 2 and 10, 1999 attachments to its financing petition, which it says offered confusing new projections of savings from securitization over the full fifteen-year period. NJBUS adds that even the BPU's assurance it will review the "distribution rate design" before the end of the transition period to see whether any additional future savings should be passed along to ratepayers violates the Act, because the Act requires the immediate pass-through to customers of all securitization savings over the term of the bonds.

In a related argument, NJBUS contends that the Final Decision violated the Act when it incorporated a 1% prepayment of anticipated securitization savings into the 5% August 1, 1999 rate decrease; specifically, it points to the provision that requires all securitization savings be passed along to customers as soon as the bonds are issued.

N.J.S.A. 48:3-62(a) allows the recovery of stranded costs through the issuance of transition bonds and the imposition of TBC charges on customers. It also provides:

> The entire amount of cost savings achieved as a result of the issuance of such transition bonds, whether as a result of a reduction in capital costs or a lengthened recovery period associated with otherwise recovery-eligible stranded costs or as a source of cash for the buyout, buydown or other restructuring of a power purchase agreement, shall be massed on to the customers of the electric public utility in the form of reduced rates for electricity.
>
> [N.J.S.A. 48:3-62(a) (emphasis added)].

The statute also provides that the issuance of transition bonds "will provide tangible and quantifiable benefits to ratepayers, including greater rate reductions than would have been achieved absent the issuance of such bonds and net present value savings over the term of the bonds." N.J.S.A. 48:3-62(b)(3). Furthermore, the rate reductions which result from the issuance of transition bonds "shall be made no later than the date on which the transition bond charge . . . becomes effective." N.J.S.A. 48:3-52(i).

Although securitization will not occur until this appeal is resolved, some of the savings anticipated from securitization are being passed along to customers even before the bonds are issued because the initial 5% rate reduction went into effect on August 1, 1999. Securitization will result in greater rate reductions during the four-year transition period than those required under the Act (13.9% rather than 10%). As the BPU said in the Final Decision, "if securitization is implemented" the proposed rate decreases will be increased to reflect any additional savings.

However, as the RA asserts, the transition bonds and TBC charges endure for fifteen years, and Attachment 2 to the BSCRO computes estimated savings to ratepayers from the transition bonds during the fifteen-year life of the bonds. But there are no mandatory rate reductions under the Act after the four-year transition period.

According to PSE&G, after the transition period ends, customers still will pay the company for distribution, transmission, and SBC and NTC charges, but they will be paying their power supplier for generation services. The only generation-related charge that customers will pay PSE&G is the TBC, and the savings from lower interest rates due to securitization will be passed along to customers through a TBC that will be lower than the MTC would have been absent securitization.

This explanation for the way securitization savings will be passed through to customers after the transition period

comports with the BSCRO, which calls for periodic adjustments to the TBC so that it reflects the lowest possible interest rates over the life of the bonds. Although the Act mandates that transition bonds savings be reflected in rate reductions, it does not mandate any such reductions after 2003. These two aspects of the Act must be read in conjunction. The BPU resolved the tension or apparent contradiction in the Act by ordering a reasonable alternative way to pass through the savings to customers.

The only troubling aspect of the respondents' position on this issue is a disagreement between PSE&G and the BPU on the meaning of certain language in the Final Decision. The BPU points out that it said it would review the overall level of savings and the level of distribution rate design before the end of the transition period to determine "whether any additional future securitization savings should be passed along to ratepayers in year five and beyond." The BPU cites to the following passage of the Final Decision:

> [W]e are concerned that, subsequent to the Transition Period, such rate design could have unintended and unnecessary impacts on PSE&G's customers, since the termination of rate reduction credit at the end of year four would, absent any other adjustment, result in an increase in rates in year five which would equal the amount of the credit in effect in year four. Moreover, the elimination of the credit in year five could result in an unpermitted shift in cost responsibility. Although it is not known at this time what the BGS [basic generation service] rate will be in year five or what the level of deferred balances for the SBC and NTC will be at that time, the Board is concerned that a simple removal of the rate reduction credit in year five without a reassessment of the other unbundled rate element, could result in total charges which exceed the total of the otherwise-appropriate unbundled rate elements. We also FIND it

> necessary and appropriate for the Board to review the overall level of rate savings as well as the level of the distribution rate design and the other unbundled rate components, including the SBC and the NTC, prior to the conclusion of the Transition Period to determine, among other things, whether any additional future savings should be passed along to ratepavers prospectively.
>
> [(emphasis added).]

In response to a reference by NJBUS to this portion of the Final Decision, PSE&G says that the BPU was referring to "potential savings from the SBC and NTC . . . not securitization savings." Indeed, the BPU Final Decision does not specifically refer to securitization savings, although the TBC is an unbundled rate component, just as the SBC and NTC.

We conclude the BPU's position that it will review rates to see if there should be post-transition period rate reductions does not violate the Act. If the BPU believes that the best use of securitization savings during the future period when rate reductions are not mandated is further rate reduction, then it can, in its discretion, so order. However, even if it does not do so, the securitization savings are being passed through to customers through the lowest possible TBC charges and lower MTC charges.

As for the RA's contentions regarding the September 2, 1999 submission by PSE&G, the due process argument was addressed in IV D, above. As noted there, the RA did have a week to question the "methodology" that PSE&G relied on in the submission when calculating the "expected net present value savings and rate reductions resulting from issuance of the Transition bonds." The RA does not now question any specific aspect of that methodology, but rather the inadequate time it had to respond to it. The RA had an opportunity, albeit a very limited one, to review and to question the

methodology. It was not absolutely denied notice or an opportunity to be heard.

Contrary to NJBUS's position, PSE&G's partial funding of the 5% August 1999 rate reduction through a 1% prepayment of anticipated securitization savings does not violate N.J.S.A. 48:3-52(i), which requires that the rate reductions resulting from issuance of the transition bonds "shall be made no later than the date on which the transition bond charge . . . becomes effective." As noted, the transition bonds have not yet been issued, but some anticipated savings have already been passed through to customers, per order of the BPU. The BPU accepted the 1% prepayment proposal in Stipulation I without comment in the Final Decision; in its brief the BPU said that its decision on this matter "reflects a proper balancing of the competing interests, and represents a pragmatic recognition that application of these funds are reasonably necessary to achieve [the Act's] mandated 5% immediate reduction, from rates previously adjudged by the BPU to be just and reasonable." NJBUS offers no justification for disturbing this aspect of the BPU's decision.

Affirmed.

BPU Order (Doc. A-1108-99T3) Dated Oct. 19, 1999
Agenda Date: 9/29/99

STATE OF NEW JERSEY
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

ENERGY

IN THE MATTER OF PUBLIC SERVICE ELECTRIC AND GAS COMPANY'S RATE UNBUNDLING, STRANDED COSTS AND RESTRUCTURING FILINGS	) ORDER DENYING) MOTION FOR) RECONSIDERATION)))))) DOCKET NOS. E097070461,) E097070462 AND) E097070463

(SERVICE LIST ATTACHED)

BY THE BOARD:

On September 13, 1999, Co-Steel Raritan ("Co-Steel") filed a motion for reconsideration of the August 24, 1999 Final Decision and Order ("Final Order" or "Restructuring Order") rendered by the Board of Public Utilities ("Board") in the above captioned matter. Co-Steel was an intervenor in the Public Service Electric and Gas Company's ("PSE&G") unbundling, restructuring and stranded cost proceedings which led to issuance of the Restructuring Order. On

September 23, 1999, PSE&G filed its answer to Co-Steel's motion.

Co-Steel is a large industrial customer served by PSE&G which takes power pursuant to a 199S contract under PSE&G's Experimental Hourly Energy Pricing Service tariff ("EHEP") approved by the Board by Order dated November 17, 1995 in Docket No. ER95010005 (hereinafter "Service Agreement" or "Contract"). Co-Steel states that electricity is one of the three most significant operating costs incurred at its Perth Amboy plant, and takes electric service with annual energy consumption exceeding 440,000,000 kWh which represents about 1 percent of PSE&G's total energy sales. The Contract with PSE&G is for a ten year term under which the first 13 million kWhs consumed each month and related demand ("Block 1") is priced, with certain minor variations, under PSE&G's High Tension Service tariff ("HTS"), and the remainder ("Block 2") is priced under a separate rate which takes account of certain adjustments for the ten year period ("Block 2 Discounted Rate") . The Contract is conditioned on Co-Steel investing $37 million in its Perth Amboy plant within a period of four years. The Contract also requires that PSE&G will be the sole source of power for the ten year term.

By its motion, Co-Steel seeks reconsideration of the Board's ruling in the Restructuring Order as it relates to Co-Steel. In the Restructuring Order, the Board (1) found that there is no legal basis for exempting Co-Steel from paying non-bypassable Market Transition Charges ("MTC"), Transition Bond Charges ("TBC") and Societal benefits Charges ("SBC") relating to its HTS tariff, and that there is no merit to Co-Steel's arguments since the cost of its power consumption under Block 1 will be reduced under the Act and its Block 2 usage will be governed by the Block 2 Discounted Rate and unaffected by the Restructuring Order; (2) rejected Co-Steel's arguments that it should be immediately released from the Contract to shop for an alternative supplier, since there has been no material change to the bargained for Contract, and because Co-Steel will be receiving power at a

net price that is lower than originally bargained for; and (3) rejected Co-Steel's arguments that it should be exempted from stranded cost charges after expiration of the Contract because the special pricing arrangements it bargained for will expire with the expiration of the Contract and Co-Steel will then have all the options available under applicable law. Restructuring Order at 113-114.

Co-Steel's Motion

In support of its motion for reconsideration, Co-Steel presents a number of allegations as follows:

> 1. The Board erred in failing to conclude that Co-Steel's ten-year Contract with PSE&G precludes the imposition of stranded cost charges either during or after the contract term. To the extent the Electric Discount and Energy Competition Act, N.J.S.A. 48:3-49 et seq. (the "Act"), on its face appears to mandate the application of stranded cost charges to Co-Steel, the Board-erred in not concluding that the Act as applied to the Co-Steel Contract violated the constitutional prohibition against impairing the obligation of contracts.
>
> 2. The Board erred in concluding that, as a result of the Final Order, Co-Steel will be receiving power at a net price lower than that originally bargained for.
>
> 3. In the alternative, in the event the Board ruled correctly with regard to the first numbered error above, the Board erred in concluding that the statutorily mandated percentage rate reduction should be applied only to Block 1 under Co-Steel's contract, rather than to both Blocks 1 and 2.
>
> 4. In the alternative, in the event the Board ruled correctly with regard to the first

numbered error above, the Board erred in concluding that under subsection 4 (d) of the Act Co-Steel's rates should be reduced effective August 1, 2002 by 13.9% from current rates, rather than 10% from 1997 rate.

5. In the alternative, in the event the Board ruled correctly with regard to the first numbered error above, the Board erred in concluding that the Act requires an initial reduction on August 1, 1999 of 5% from current rates, rather than 5% from 1997 rates.

[Co-Steel's Brief on Motion at 1-2]

Co-Steel discusses the above allegations at some length in Points 1 through 5 of its brief in support of its Motion for Reconsideration ("Brief on Motion"). These arguments are summarized hereinbelow.

In Point 1, Co-Steel argues, among other things, that it would not have entered into the Contract with PSE&G had it known that it would be subject to stranded cost charges after the contract period ended. In other words, Co-Steel argues that it was operating under the assumption that it would not be obligated to PSE&G in any way after the ten year period so that it could freely partake in the competitive market, and that it was its intent that it would lock in a lowered rate for the period. Co-Steel also asserts that there is sufficient evidence in the record to show that PSE&G had no intention of charging stranded costs at the time the Contract was negotiated and executed. Co-Steel further argues that the Contract, by its very terms, precludes charges other than those established under the Contract, either during its term or after its expiration. For these and other reasons, Co-Steel concludes that imposition of a charge for stranded costs during or after the term of the Contract falls outside of the Contract itself and would not be in keeping with the intent of the parties.

Co-Steel argues that it has lived up to its side of the bargain, in that it had the opportunity to move its operations out of New Jersey, but stayed because of the Contract; that it was required to make a $37 million investment in its Perth Amboy plant over a four year period, and did so; and that it is now confronted with additional unanticipated costs being imposed outside of the terms of the Contract. Co-Steel concludes, therefore, that principles of equitable estoppel (i.e. fundamental principles of fairness in light of Co-Steel's detrimental reliance) should preclude the collection of stranded cost surcharges from Co-Steel.

Co-Steel further asserts that the Act itself is unconstitutional as applied to Co-Steel because any collection of charges for stranded costs outside of the specific terms of the Contract would violate the contract impairment clauses of the United States and New Jersey Constitutions. Co-Steel asserts that the Act's imposition of a non-bypassable surcharge is clearly unconstitutional, and that the Board erred because it failed to make this finding in the Restructuring order.

Co-Steel also presents some additional arguments relating to language in the Contract. Thus, it argues that the MTC, TBC and SBC are not like other costs such as taxes and other assessments which under Section 7 of the Contract are allowed to be passed along to Co-Steel by PSE&G, because the MTC, TBC and SBC are to be collected by PSE&G "on its own initiative and for its own benefit or that of its shareholders." Co-Steel's Brief at 11, footnote 11. Co-Steel therefore concludes that the imposition of these charges is a clear impairment of the Contract and not just a pass-through of legitimate charges imposed by outside authorities. Co-Steel also argues that it is error to construe paragraph 9 of the Contract, which clearly indicates that the Contract is subject to changes in the law, to mean that any such future law would apply even where as here the law so clearly conflicts with the dominant purpose of the Contract. Co-Steel's Brief at 12, footnote 13.

In Point 2 of its brief, Co-Steel argues that the Board also erred when it stated on page 113 of the Restructuring Order that: "Co-Steel will be receiving power at a net price lower than that originally bargained for as a result of this Order." Co-Steel asserts that because it experienced, relative to other customers, a disproportionate increase in rates designed to recover Demand Side Management costs ("DSM") in April 1998, which amounts to an increase of 8.8 percent applicable to Blocks 1 and 2, its rates have not been offset by the 5 percent reduction in rates applicable to just Block 1 which was implemented in August 1999. For this reason, Co-Steel argues that it will have to pay significantly more than what it bargained for in 1995 and that the Board should reassess its view regarding how Co-Steel will fare under the Restructuring Order and under deregulation generally.

In Point 3 of its brief, Co-Steel argues in the alternative that should the Board determine not to reconsider its decision that Co-Steel must pay stranded cost charges, then the Board erred when it ruled that the rate reductions mandated by the Act are to be applied to Block 1 only and not Block 2. Co-Steel asserts that the Board's conclusion is in conflict with the Act and is unfair because it imposes on Co-Steel the full burden of stranded costs but allows only half the rate decrease granted to all other PSE&G customers.

On this point, Co-Steel argues that because subsection 4(d)(1) of the Act mandates that the level of rates for each customer class is to be reduced and because it is itself a separate customer class, its Block 2 rates should be reduced by the mandated reductions in the same manner as its Block 1 rates. It bases this position on the fact that it takes power under the Block 2 Discounted Rates pursuant to the EHEP tariff which, it asserts, is a separate customer class. Co-Steel contends that the Board's Restructuring Order erred in this regard, because it left Co-Steel's Block 2 consumption as not being part of any customer class, which it argues cannot be the case. Co-Steel concludes that because subsection 4(d) requires that there be rate reductions for all customer classes,

percentage rate reductions must be applied to Co-Steel's total consumption under both Blocks 1 and 2.

In Point 4 of its brief, Co-Steel argues in the alternative that should the Board uphold its decision that Co-Steel must pay stranded cost charges, it erred in determining that Co-Steel's rates should be reduced by 13.9% from current rates, rather than reduced 10% from bundled rates in existence as of April 30, 1997. Co-Steel argues in this regard that because the DSM related increase in its rates in 1998 was greater than 3.9 percent, a rate decrease of 13.9 percent does not satisfy the requirements of subsection 4(d) of the Act that Co-Steel experience a rate decrease which is at least 10 percent below rates in effect as of April 30, 1997.

In Point 5, Co-Steel also argues in the alternative that the Board erred in ruling that the rate decrease effective August 1, 1999 should be from current rates rather than from bundled rates as of April 30, 1997. Co-Steel argues that even though there is no specific reference in the Act to the 5 percent rate reduction being determined relative to bundled 1997 rates, it is logical to assume from the language of subsection 4(d) thereof that the Legislature intended to have the 5 percent reduction start from the same starting date as the 10 percent reduction which the Act explicitly requires be measured from bundled rates existing on April 30, 1997. Thus, Co-Steel concludes that under subsection 4(d) of the Act, each customer class should have experienced a 5 percent reduction relative to the aggregate level of bundled rates in effect as of April 30, 1997 and not relative to current rates, that is, rates in effect as of July 31, 1999.

PSE&G's Answer to the Motion

PSE&G first contends that the Board should not reach the merits of Co-Steel's arguments because Co-Steel did not file its motion for reconsideration within 15 days of issuance of the Restructuring Order, as is required by N.J.A.C. 14:1-8.6(a). It then goes on to address Co-Steel's arguments.

With regard to Point 1 of Co-Steel's brief, PSE&G maintains that all of Co-Steel's arguments set forth therein lack merit because they represent nothing new for the Board to consider which it has not already considered in the proceedings which led to issuance of the Restructuring Order. PSE&G also claims that there has been no showing of material errors of fact or law relating thereto. PSE&G concludes that this lack of new evidence or showing of error in Point 1 means that Co-Steel has failed to meet the standards for reconsideration followed by the Board. Because PSE&G believes that the Board has already adequately considered and rejected these arguments and because it believes that there is no new allegations of fact or law relating thereto, PSE&G does not answer each specific issue raised by Co-Steel in Point 1 but instead relies upon its earlier responses filed during the unbundling, stranded costs and restructuring proceedings.

As to Co-Steel's Point 2, PSE&G argues that Co-Steel is simply wrong when it asserts that the Board erred in finding at that Co-Steel will experience lower net rates as a result of the five percent August 1, 1999 rate reduction than what it had bargained for with P8E&G. PSE&G's contends that Co-Steel actually bargained for and the Contract explicitly provides for the inclusion of future DSM increases it now argues have caused its rates to be higher than what they were when the parties entered into the Contract. Because the inclusion of any future DSM charges on both Block 1 and 2 were anticipated under the terms of the Contract, PSE&G concludes that the August 1, 1999 five percent reduction actually reduces Co-Steel's rates to a level below that for which it bargained in 1995. PSE&G further argues that Co-Steel has not recognized that "but for" the Act and the Board's Restructuring order, there would have been no discount implemented August 1, 1999 and no future discounts under the Act relative to the bargained for prices in the Contract, and that these discounts improve, not worsen, Co-Steel's position relative to the bargained for prices under the Contract.

With regard to Point 3 of Co-Steel's brief, PSE&G argues that Co-Steel cannot claim that the Act supersedes the terms of the Contract to provide the rate reductions, while at the same time arguing that the Act cannot supersede its contract and allow for the imposition of stranded costs. In response to Co-Steel's claim that it is a customer class of one entitled to rate reductions not only relating to Block 1 charges under the HTS tariff, but also Block 2 charges, PSE&G argues that the Act does not supersede the Board approved contract wherein the parties agreed that its Block 1 usage would be priced about the same as an HTS tariff customer, with Block 2 usage covered by the terms of the Block 2 Discounted Rate. PSE&G also cites to EHEP tariff page number 85 which provides that "service under this rate schedule is available on an individual contract basis," and "that customer's cost of energy will vary hourly" with changes in "marginal energy cost," and that "all other terms of the service are described by the contract." PSE&G's EHEP Tariff Sheet No. 85.

PSE&G also argues that there is no merit to the argument in Point 4 of Co-Steel's brief that the Board erred when it concluded that by August 1, 2002 Co-Steel's rates will be reduced by 13.9 percent from current rates and not 10 percent from April 30, 1997 bundled rates. On this issue, PSE&G asserts that Co-Steel is simply overreaching with regard to the Restructuring Order since it is clear from the stipulation approved by the Board that Co-Steel will, by August 1, 2002, receive a 10 percent discount on its Block 1 usage relative to what its bundled rates as an HTS tariff customer would have been on April 30, 1997.

With regard to Co-Steel's Point 5, PSE&G argues that Co-Steel is misinterpreting subsection 4(d) of the Act when it suggests that the only logical explanation of the language therein is that the August 1, 1999 five percent reduction should be relative to bundled April 30, 1997 rates and not current rates. PSE&G maintains that Co-Steel's argument is not correct because under any reading of the plain language of

subsection 4(d)(2), had the Legislature intended that the starting point for the phase-in would be a five percent reduction from bundled rates as of April 30, 1997, it would have so stated in the Act. PSE&G also suggests that it is apparent that the Legislature intended to phase in the rate reductions over time and that it left much of this job to the Board's discretion, in keeping with its overall responsibility to ensure safe, adequate, and proper service. PSE&G concludes that Board in its discretion provided a logical interpretation of the Act that the five percent August 1, 1999 reduction in rates should be measured against current rates at the starting date for electric choice.

DISCUSSION

Absent a legislative restriction, administrative agencies have the inherent power to reopen or to modify and rehear prior decisions. (In re Trantino Parole Application, 89 N.J. 347, 364 (1982); Skulski v. Nolan, 68 N.J. 180, 195 (1975); Ruvoldt v. Nolan, 63 N.J. 171, 183 (1973); Handlon v. Town of Belleville, 4 N.J. 99, 106-107 (1950)), and as to the Board, N.J.S.A. 48:2-40 expressly provides that the Board at any time may order a rehearing and/or extend, revoke or modify an order made by it. Tp. of Deptford v. Woodbury Terrace Sewerage Corp., 54 N.J. 418, 425 (1969); N.J. Bell Tel. Co. v. Bd. of Pub. Util. Comm'rs, 12 N.J. 568,579 (1953); Central R. Co. of N.J. Dept. of Public Utilities, 7 N.J. Super. 254-255 (1951); Sudler v. Environ. Disposal Corp., 219 N.J. Super. 52, 62 (App. Div.) certif. denied 109 N.J. 56 (1987). An administrative agency may invoke its inherent power to rehear a matter "to serve the ends of essential justice and the policy of the law." Handlon v. Town of Belleville, supra, at 107. The power to reappraise and modify prior determinations may be invoked by administrative agencies to protect the public interest and thereby to serve the ends of essential justice. Trap Rock Industries, Inc. v. Sagner, 133 N.J. Super. 99, 109 (App. Div. 1975) Generally, a party seeking reconsideration of a Board decision must demonstrate special circumstances, such as material error which justify reconsideration of the case.

Thus, where there is a new development or new evidence relating to established facts or a material misapprehension by the Board concerning an essential matter which is critical to its final determination, there is a reasonable basis for reconsideration of the Board's Order. See, In re Trantino Parole Application, 89 N.J. 347, 365 (1982) ; Trap Rock Industries, Inc. v. Sagner, supra, at 110. Absent such a showing, the Board will not reconsider its final decision.

As noted above, as a preliminary matter, PSE&G argues that the Board should not consider any aspect of Co-Steel's September 13, 1999 brief because it was filed more than 15 days after the signing of the Restructuring order which occurred on August 24, 1999. N.J.A.C. 14:1-8.6(a) provides that filings for reconsideration must be within 15 days of issuance of a final decision or Order by the Board. While Co-Steel's brief was filed late relative to the August 24, 1999 date of the Board's Order, the Board recognizes that copies of the 126 page Order were served upon the extensive service list on or about August 31, 1999 via first class mail. Therefore, it is reasonable for the purposes of this case to count the time for filing any motion for reconsideration from the August 31, 1999 date, and accordingly, to consider Co-Steel's motion and brief as having been timely filed.

With regard to Co-Steel's arguments in Point 1 of its brief, it is important to note that Co-Steel presented virtually identical arguments before the Administrative Law Judge ("ALJ") in this matter. While the ALJ did not address Co-Steel's concerns, as noted above, the Board at page 113 of the Restructuring Order found that the Act indeed applied to Co-Steel at least with regard to its HTS tariff and that customers utilizing this tariff must be assessed non-bypassable MTC, TBC and SBC charges. In this regard, N.J.S.A. 48:3-60, N.J.S.A. 48:3-61 and N.J.S.A. 48:3-67 provide that utilities may recover the above charges from all electric public utility customers. Therefore, in keeping with our ruling in the Restructuring Order, we conclude that the Act requires

payment of the MTC, TBC and SBC by Co-Steel relating to its Block 1 usage under the HTS tariff.

As noted above, Co-Steel also argues that the Board should have concluded that if the Act on its face mandates the imposition of stranded cost charges on Co-Steel, then the Board should have ruled that any application of the law as applied to the Co-Steel contract violates the constitutional prohibition against the impairment of contracts. The threshold issue here is whether or not there has in fact been an impairment of the Contract.

Co-Steel argues that the provisions of the Contract which allow for certain adjustments to the Contract due to the passthrough of new assessments or taxes (See, Co-Steel's Brief on Motion at 11, note 11) or changes in law (See, Co-Steel's Brief on Motion at 12, note 13) cannot be read to mean that the Legislature or the Board can impair the Contract as Co-Steel alleges has been done here. While the above contract provisions could be read to allow for the imposition of charges such as the MTC, TBC and SBC, Co-Steel distinguishes these charges from taxes or other assessments which are incurred by PSE&G and passed through to customers which are clearly allowed under the Contract, and argues that the MTC, TBC and SBC charges are different in that they constitute added amounts not imposed on PSE&G as would be the case with taxes, but are charges collected on its own initiative and f or its own benefit or that of its shareholders. Co-Steel also argues that any change in law which conflicts with the principal purpose of the Contract cannot be construed to override all other provisions of the Contract.

Contrary to Co-Steel's arguments, however, the Board did not determine that the MTC, TBC and SBC charges should be imposed on top of the Block 2 Discounted Rate. Therefore, there has been no interference with the Block 2 Discounted Rate. As stated in the Restructuring Order, the terms relating to Block 2 of the Contract remain unchanged, and accordingly, the argument that there has been an

unconstitutional impairment need not be addressed further with regard to Block 2 rates. With regard to Block 1, it is also clear that, unlike the Block 2 Discounted Rate, the HTS tariff is not designed, any more than any other tariff is designed, to insulate customers from future additional charges relating to the provision of service. In this regard, all customers, including Co-Steel, who take service under the HTS tariff, will be assessed the MTC, TBC and SBC charges and will also experience the rate reductions for said service as mandated by the Act. Therefore, because the bargained for agreement remains in place, with appropriate adjustments to the HTS tariff only, enactment of the Act has not interfered with or impaired the Contract in a manner which would give rise to a finding of unconstitutionality.

As noted above, Co-Steel argues that the Contract precludes imposition of stranded cost charges even after expiration of the Contract. Co-Steel also argues that the Board's ruling that Co-Steel not be exempt from such charges after the Contract expires will at that time, in effect, prevent it from entering into an alternative supply contract with other purveyors of power. After review, we see nothing in the record or in Co-Steel's arguments which indicates that the Board erred in its finding in this regard. In the Restructuring Order the Board states:

> Simply put, any special pricing arrangements for which it has bargained expire with the expiration of the special contract. After the expiration of its contract with PSE&G, Co-Steel will be subject to and have all of the options afforded under applicable law, including with regard to utility tariffs, and the ability to shop for an alternative supplier.
>
> [Restructuring Order at 114]

As described above, Co-Steel alleges in Point 2 of its brief that the Board made a factual error in the Restructuring Order in concluding that Co-Steel will be receiving power at a net

price that is lower than the price for which Co-Steel originally bargained. Co-Steel argues that the opposite is in fact true. The assumption behind its argument in this regard is that Co-Steel, in entering into the Contract, did not bargain for the 1998 DSM increase resulting from the DSAF proceedings, and that the rate decrease of 5 percent implemented August 1, 1999, did not fully offset this increase.

Contrary to Co-Steel's argument, it is clear that Co-Steel did indeed bargain for DSM cost recovery such as was implemented through the 1998 DSAF adjustment. In this regard, the Board notes that Co-Steel's Service Agreement with PSE&G provided for the recovery of DSM expenses on Block 1 kWh usage and that Co-Steel also entered into a stipulation which modified the Service Agreement to allow for DSM cost recovery to be extended to Block 2 kWh usage, which stipulation was subsequently approved by Board order dated November 17, 1995 (Docket No. ER95010005). Therefore, it is incorrect to argue as Co-Steel has, that Co-Steel is worse off now than it had anticipated under its bargained for contract even after the 5 percent reduction in August 1999. The 5 percent decrease in 1999 is a rate reduction which clearly benefits Co-Steel and in fact improves its position relative to what it was otherwise paying under its bargained for contract.

Co-Steel asserts in Point 3 of its brief that even if the Board determined that Co-Steel must indeed pay stranded costs, the Board erred in concluding that the statutorily mandated percentage rate reductions should be only applied to Block 1 under the Contract rather than to both Block 1 and Block 2. While the Block 2 Discounted Rate allows for certain rate adjustments during its term, including DSAF adjustments, under its terms Co-Steel still remains the beneficiary of contracted for reduced rates for a period of 10 years. In 1995, by entering into the Contract with PSE&G, Co-Steel was able to reduce its energy bill by a substantial amount. Thus, based on the average PJM billing rate assumed in Co-Steel's 1995 filing with the Board, the Block 1 and 2

rates under the Contract reduced Co-Steel's annual bill by approximately $7.3 million to about $18.7 million, or by about 28 percent. See, Board Order in Docket No. ER95010005 at 4-5. Moreover, increased rates passed on to other customers subject to PSE&G's tariffs which are not part of the allowed for adjustments under the Block 2 Discounted Rate are not to be passed along to Co-Steel. Despite this bargained for benefit resulting from the Contract, Co-Steel argues now that it should be the beneficiary of the mandated rate reductions not only for the service it takes under its HTS tariff (Block 1), but also under its Block 2 Discounted Rate. Co-Steel supports it argument by reference to subsection 4(d) of the Act.

The Board rejects the claim that the Act supersedes the terms of the Block 2 Discounted Rate to mandate further rate reductions. The Board believes that it is much more reasonable to interpret the limited reference to "customer class" set forth at subsection 4(d) of the Act, N.J.S.A. 48:3-52, to mean customers served under fixed tariffs, not customers that have made separate arrangements to receive service at heavily discounted rates. Therefore, the Board reaffirms its finding that the mandatory rate reductions do not and cannot apply to Co-Steel's Block 2 Discounted Rate.

We further note that resolution of Co-Steel's allegation in Point 4 that Co-Steel should receive only a 13.9 percent rate reduction as of August 1, 2002, will depend to a large extent on the particular tariff design to be developed for Co-Steel as an EHEP customer in 2002. Co-Steel's argument is based on the fact that because DSAF charges are recovered on a volumetric basis, its DSAF increases in 1998 were higher than those of other customers. Co-Steel thus asserts that it should experience, due to those earlier larger DSAF increases, a greater reduction in rates than those customers that may have experienced a DSAF increase closer to the overall average of 3.9 percent. The Board agrees that this issue should be looked into at the time the appropriate tariff designs covering these future rate reductions are Completed and

approved by the Board. Therefore, before the Board gives its final approval to rate reduction to be effective on August 1, 2002, it will consider the appropriate rate design for all of its customers including Co-Steel. In doing so, the Board will be considering any arguments Co-Steel may wish to present at that time.

As noted above, Co-Steel also argues that the 5 percent mandatory rate reduction implemented August 1, 1999, should be a decrease relative to April 30, 1997 rates rather than relative to current rates and that the Board, therefore, erred in applying said reduction to current rates. As the Board found in rendering the Restructuring Order, nothing in the Act mandates that the 5 percent reduction be set relative to 1997 rates. The Act only refers to the April 30, 1997 date in connection with the mandatory 10 percent reduction, not the 5 percent reduction. In this regard, the Board agrees with PSE&G in its Answer in this matter, where it argues that had the Legislature intended to reduce rates by 5 percent as of the date of implementation of retail choice relative to 1997 rather than current rates, it would have explicitly added language to this effect in the Act. Therefore, we find no basis for reconsidering said decision at this time.

In view of the foregoing, it is clear that Co-Steel has not met the Board's standards for reconsideration of the Restructuring Order in that there has been no showing that the Board made a material error of fact or law in the Restructuring order. Moreover, to a great extent, Co-Steel is rearguing issues it has already argued during the proceedings which led to issuance of the Restructuring Order and has not provided new evidence related to a new development in this case which would cause the Board to reconsider its rulings. Therefore, after review, the Board HEREBY FINDS and CONCLUDES that Co-Steel's arguments lack merit and HEREBY DENIES Co-Steel's Motion for Reconsideration.

DATED: 10/19/99 BOARD OF PUBLIC UTILITIES

BY:

/s/_____
HERBERT H. TATE
PRESIDENT

/s/_____
CARMEN J. ARMENTI
COMMISSIONER

/s/_____
FREDERICK F. BUTLER
COMMISSIONER

ATTEST: /s/_____
MARK W. MUSSER
SECRETARY

I HEREBY CERTIFY that the within
document is a true copy of the original
in the files of the Board of PublicUtilities

/s/_____

BPU Order (Doc. A-772-99T3)
Dated Sept. 17, 1999

STATE OF NEW JERSEY
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

AGENDA DATE: 09/10/99

IN THE MATTER OF THE PETITION OF PUBLIC SERVICE ELECTRIC AND GASCOMPANY FOR A BONDABLE STRANDEDCOST RATE ORDER IN ACCORDANCE WITH CHAPTER 23 OF THE LAWS OF 1999, TO AUTHORIZE THE IMPOSITION OF A NONBYPASSABLE TRANSITION BOND BONDABLE TRANSITION PROPERTY, THE ISSUANCE AND SALE OF NOT TO EXCEED $2.525 BILLION AGGREGATE PRINCIPAL AMOUNT TO TRANSITION BONDS BY A FINANCING ENTITY TORECOVER PETITIONER'S BONDABLE STRANDED COSTS, AND THEAPPLICATION OF TRANSITION BOND PROCEEDS TO RETIRE OUTSTANDING UTILITY DEBT, EQUITY OR BOTH, AND TO APPROVE THE FORMULA FOR THE CALCULATION AND ADJUSTMENT OF THE TRANSITION BOND CHARGE AND MARKET TRANSITION CHARGE-TAX RELATED THERETO.

BONDABLE STRANDED
COSTS RATE ORDER

DOCKET NO.: EF99060390

(SERVICE LIST ATTACHED)

BY THE BOARD:

By Petition filed with the Board of Public Utilities ("Board" or "BPU") on June 8, 1999 ("Petition"), Public Service Electric and Gas Company ("Petitioner"), for purposes of recovering the stranded costs deemed eligible for rate recovery by the Board in the Summary Order dated April 21, 1999, which was more fully detailed in the Final Decision and Order dated August 24, 1999 ("Restructuring Order"), in Docket Nos. E097070461, E097070462 and E097070463, together with other bondable stranded costs described in the Electric Discount and Energy Competition Act ("Act"), P.L. 1999, c. 23, codified at N.J.S.A. 48:3-49, et seq., and to allow Petitioner to comply with the rate reduction requirements determined by the Board to be necessary and appropriate consistent with the provisions of Sections 4 and 13 of the Act, requests that the Board issue an irrevocable bondable stranded cost rate order (the "Financing Order") to authorize: (i) the imposition of a nonbypassable transition bond charge, as provided in Section 18 of the Act, and the collection of such charge (the "Transition Bond Charge") by Petitioner or another entity approved by the Board; (ii) the sale of the Bondable Transition Property (as defined below) to an approved financing entity; (iii) the issuance and sale of not to exceed $2.525 billion aggregate principal amount of transition bonds (the "Transition Bonds") by the financing entity to recover Petitioner's bondable stranded costs and to apply the proceeds of such bonds to retire Petitioner's outstanding debt, equity or both; (iv) the formula for the imposition and adjustment of a nonbypassable market transition charge (the "MTC-Tax") and the collection of such charge as previously authorized by the Board in the Restructuring Order to recover Federal Income and State Corporate Business Taxes associated with the Bondable Transition Property (as defined below) and the collection of the Transition Bond Charges and the MTC-Tax (the "MTC-Tax Component") to reconcile future tax rates and MTC-Tax collections to assure full recovery of the MTC-Tax Component; and (v) the formula for the calculation and adjustment of the Transition Bond Charge.

Petitioner has stated that the proceeds of the Transition Bonds (net of Upfront Transaction Costs (as defined below) will be used by or on behalf of Petitioner solely for the purposes of reducing the amount of its otherwise recovery-eligible stranded costs, through the retirement of debt or equity, or both. Petitioner states that the entire amount of cost savings achieved as a result of the issuance of the Transition Bonds shall be passed on to customers in the form of reduced rates for electricity.

1. PROCEDURAL HISTORY

On April 30, 1997, the Board issued an Order adopting and releasing a document entitled "Restructuring the Electric Power Industry in New Jersey: Findings and Recommendations" ("Final Report"). The Final Report contained the findings and recommendations concerning the future structure of the electric power industry in New Jersey, including the recommendation that in the future electric consumers be offered a choice of electric power suppliers in order to effectuate substantial economic benefits by way of lower electric bills and the provision of more service options to the State's residents and businesses.

Recognizing that there were a number of substantial procedural steps necessary to implement the recommended policies and to prepare for the commencement of retail competition, the Board directed in that Order that each of the State's four investor owned electric utilities make three filings: a rate unbundling petition, a stranded cost petition, and a restructuring plan.

On July 11, 1997, the Board issued an Order Establishing Procedures, wherein it determined to transmit each utility's rate unbundling and stranded cost filings to the Office of Administrative Law ("OAL") for hearings and the issuance of an Initial Decision. The Board also determined to retain the restructuring plan filings for its own review and, as necessary, hearings.

On July 15, 1997, Petitioner filed its Proposal in Response to the Final Report. The unbundling and stranded costs portions of Petitioner's filing were transmitted to the OAL and assigned to Administrative Law Judge ("ALJ") Louis G. McAfoos t/a (BPU Docket Nos. E097070461 and E097070462 respectively). The restructuring portion of the filing was retained by the Board (BPU Docket No. E097070463).

Twenty days of evidentiary hearings on the unbundling and stranded costs proceeding were conducted by ALJ McAfoos at the OAL between February 9, 1998 and March 18, 1998. During that time period, witnesses were cross-examined on their prefiled direct testimony, as well as on any filed rebuttal or surrebuttal testimony. At the close of hearings, a briefing schedule and issues outline were adopted by ALJ McAfoos. After requesting and receiving extensions of time from the Board, Initial Briefs were filed on or about April 13, 1998. Reply Briefs were filed on or about April 20, 1998.

After the Petitioner's unbundling and stranded cost hearings and briefing were completed at the OAL, approximately twenty additional days of evidentiary hearings were held before Commissioner Carmen J. Armenti between April 27, 1998 and May 28, 1998. During these dates, the parties presented testimony and conducted cross-examination on certain identified restructuring issues affecting all four electric utilities.

Following the close of hearings before Commissioner Armenti, briefs and reply briefs on the restructuring issues were filed on June 26 and July 17, 1998, respectively.

After requesting and receiving an extension of time from the Board, ALJ McAfoos issued an Initial Decision and Report on Petitioner's unbundling and stranded cost filings on August 14, 1998. The parties filed Exceptions and Replies to Exceptions to the Initial Decision with the Board on October 2, 1998 and October 30, 1998, respectively.

On February 9, 1999, Governor Whitman signed the Act into law. The Act authorizes the Board to permit competition in the electric generation and natural gas supply marketplaces and such other traditional utility areas as the Board determines. In addition, all four electric utilities were mandated to implement specific rate reductions over a period of four years. Among other things, the Act requires that the Board, by Order, shall provide that by no later than August 1, 1999 each electric public utility shall provide retail choice of electric power suppliers for its customers, reduce its aggregate level of rates for each customer class by no less than five percent, unbundle its rate schedules and establish so-called "shopping credits" applicable to the bills of retail customers who choose alternative electric power suppliers.

By Order dated February 16, 1999, the Board established guidelines and a schedule for the commencement of settlement negotiations among the parties in the Petitioner's stranded costs and unbundling proceedings. The Board set a deadline of March 3, 1999 for the submission to the Board of a negotiated settlement, which deadline was later extended to March 5, 1999. No comprehensive settlement was reached among all the parties; however, on March 17, 1999 a proposed stipulation of settlement ("Stipulation") was filed by Petitioner and eight other parties. A proposed alternative stipulation of settlement ("Stipulation II") was submitted to the Board on March 29, 1999 by the Division of the Ratepayer Advocate and five other parties. The parties were provided the opportunity to submit comments to the Board on the Stipulation by April 5 and comments on Stipulation II by April 7, 1999.

At its April 21, 1999 open public agenda meeting, the Board found that with certain modifications the Stipulation could serve as a reasonable framework for a fair and reasonable resolution of the matters and issued its Summary Order dated April 21, 1999 ("Summary Order") memorializing the Board's decision in BPU Docket Nos. E097070461, E097070462 and E097070463. In that

Summary Order, the Board determined, among other things, that Petitioner would have an opportunity to recover up to $2.94 billion net of tax of stranded costs, in part through the securitization of $2.4 billion.

As noted above, Petitioner filed its Petition in this securitization matter on June 8, 1999. In response, by motion filed July 2, 1999, the New Jersey Business Users filed a motion to intervene in this matter. On July 9, 1999, Co-Steel Raritan also filed a motion to intervene. On July 22, 1999, Petitioner filed separate responses to both motions. On July 23, 1999, movants filed individual replies to Petitioner's responses. At its open public agenda meeting on July 26, 1999, the Board denied both motions (BPU Docket. No. EF99060390).

On August 11, 1999, the Ratepayer Advocate filed a letter dated August 11, 1999 in which it raised 13 Issues, including an argument that evidentiary hearings (Issue I set forth in the Ratepayer Advocate's Memorandum) are required to be held in this Docket. On August 13, 1999, Petitioner filed its reply thereto. By letter dated August 24, 1999, Petitioner submitted a proposal to resolve two of the Issues (Issues IX and X) raised by the Ratepayer Advocate. At its open public agenda meeting on August 24, 1999, the Board rendered its findings regarding Issues II through VIII and Issue XIII. The Board also found that hearings were not required with respect to Issues IX and X and held in abeyance a decision on Issues XI and XII. The Board has carefully considered the Ratepayer Advocate's comments as well as the response thereto by Petitioner, in rendering this Order and Issues IX through XII are addressed herein in Section 5.

As noted, by Order dated August 24, 1999, the Board issued the Restructuring Order in the unbundling, stranded cost and restructuring proceedings (Docket Nos. E097070461, E097070462 and E097070463). In doing so, the Board memorialized with greater detail the Board's April 21, 1999 decision approving the level of stranded costs and the amount to be securitized in this financing proceeding. A

fuller description of the procedural history regarding the unbundling, stranded costs and restructuring proceedings is included in the Restructuring Order.

On August 9, 1999, Petitioner filed with the Board a copy of the Special Purpose Entity's ("SPE") (defined below) Registration Statement on Form S-3 relating to the Transition Bonds ("SEC Filing"). On September 2, 1999, Petitioner filed revised Attachment A-1 to its Petition (describing Ratepayer Savings methodology) as well as its quarterly report on Form 10-Q with the Securities and Exchange Commission ("SEC") for the quarter ended June 30, 1999 ("10-Q").

2. TRANSITION BOND TRANSACTION

a. Proposed Structure

A general description of the Transition Bond transaction structure (the "Transition Bond Transaction") proposed by the Petitioner follows. This proposed structure is subject to modification, depending upon the requirements of tax authorities, input from underwriters in connection with the marketing of the Transition Bonds and negotiations with nationally recognized statistical rating organizations (the "rating agencies") selected by Petitioner to assign credit ratings to the Transition Bonds. Petitioner states that the proposed structure is intended to minimize debt service costs, maximize ratepayer savings and create a substantially level charge over the life of the Bonds while obtaining the best possible rating for the Transition Bonds as asset-backed securities. Petitioner has requested that the Board authorize the execution of hedging arrangements (as described in Paragraph 2(e) below). The final structure, pricing, terms and conditions will be determined by Petitioner at the time Transition Bonds are priced, subject to an approving certification by the designee (the "Designee") of the Board as provided herein.

In the Restructuring Order, the Board approved the issuance of up to $2.525 billion of Transition Bonds to permit

the recovery by the Petitioner of $2.4 billion of net of tax bondable stranded costs plus transaction costs not exceeding $125 million. The Board also determined in the Restructuring Order that the Federal Income and State Corporate Business Taxes which are reflected in the grossed-up revenue requirement associated with the $2.4 billion in net of tax stranded costs being securitized are legitimate recoverable stranded costs to be recovered through the MTC-Tax approved in the Restructuring Order.

The Petitioner has requested the authority to recover its bondable stranded costs as defined in Section 3 of the Act, including (1) the costs, (including, but not limited to, redemption premiums, unamortized costs of issuance and interest and preferred dividends accruing on or after the issuance of the Transition Bonds), estimated at $100 million, of retiring existing debt or equity, or both, with the proceeds of the Transition Bonds ("Capital Reduction Costs"); (2) the costs, estimated at $25 million, incurred to issue the Transition Bonds ("Upfront Transaction Costs"); and (3) principal and interest on the Transition Bonds, together with the costs of paying, refinancing, administering and servicing, credit enhancing (if any), overcollateralizing and hedging the Transition Bonds as more fully described herein ("Ongoing Transition Bond Costs") (such Capital Reduction Costs, Upfront Transaction Costs and Ongoing Transition Bond Costs all being hereinafter referred to as "Bondable Stranded Costs"). The Petitioner has also requested approval of the formula for the calculation and adjustment of the Transition Bond Charge and MTC-Tax related thereto.

Petitioner has further requested that pursuant to this Financing Order, Petitioner be granted authority to recover through the sale of the Bondable Transition Property up to $2.525 billion of its Bondable Stranded Costs, including Capital Reduction Costs and Upfront Transaction Costs. Ongoing Transition Bond Costs will be recovered by the SPE through the assessment and collection of the Transition Bond Charge, a separate, nonbypassable charge assessed and

collected from all customers of Petitioner and/or any successor electric public utility operating within Petitioner's existing service territory, except as provided in Section 28 of the Act.

Petitioner states that the principal asset to be used to secure the Transition Bonds is the Bondable Transition Property. Petitioner points out that pursuant to Section 16 of the Act, this Financing Order and the Transition Bond Charges are irrevocable upon this Financing Order's becoming effective pursuant to Section 19 of the Act, and this Financing Order cannot be rescinded, altered, repealed, modified or amended by the Board or any other governmental entity; nor impaired by the State of New Jersey, as pledged in Section 17 of the Act.

Petitioner states that it will form a non-utility, bankruptcy-remote special-purpose entity (the "SPE"), wholly owned by Petitioner, and will provide the initial capitalization of such SPE. The Petition provides that Petitioner will sell the Bondable Transition Property directly or through an assignee (as defined in the Act) to the SPE in a transaction which, under Section 23 of the Act, will be a legal true sale and absolute transfer to such SPE, and that the SPE will constitute a financing entity for purposes of the Act.

To raise the funds to pay the purchase price of the Bondable Transition Property to Petitioner, the SPE will issue and sell Transition Bonds, the net proceeds of which bonds will be remitted to Petitioner. The SPE will issue and sell the Transition Bonds in a negotiated public offering as asset-backed securities ("ABS"). Petitioner states that all prior securitization of utility stranded costs in other jurisdictions have been structured as ABS and sold on a negotiated basis and the expertise of an underwriter is critical to the structuring, pricing and marketing of securities in the ABS market. Petitioner notes that in states such as Massachusetts where competitive bidding requirements would otherwise be applicable, bidding of stranded cost securitization transactions has either been waived or not required to access the ABS

market For these reasons, Petitioner and Lehman Brothers, its lead underwriter, believe that a negotiated sale will assure that the Transition Bonds will receive the highest possible rating and will obtain the lowest possible interest and transaction costs, ensuring compliance with the requirements of Section 14(b)(4) of the Act which provides that Petitioner's customers pay the lowest transition bond charges consistent with market conditions at time of pricing and the terms of this Order.

Petitioner states that all of the assets of the SPE, including, without limitation, the Bondable Transition Property and the other collateral of the SPE (the "Other SPE Collateral"), will be pledged as collateral to secure the Transition Bonds. Petitioner notes that the Other SPE Collateral may include (without limitation) the rights of the SPE under the Transition Bond Transaction documents, including a sale agreement by which the SPE acquires the Bondable Transition Property and receives certain indemnification from the Petitioner, a servicing agreement by which Petitioner or any successor in that capacity acts as servicer of the Bondable Transition Property (the "Servicer"), an administration agreement by which the SPE will be administered, and various trust accounts of the SPE.

While the Board is requested to approve Transition Bonds with scheduled amortizations not exceeding 15 years at issuance in accordance with Section 14 of the Act, it is also requested to approve stated maturities of up to two additional years in order to reduce overcollateralization requirements and enhance the prospects of securing the highest possible credit rating for the Transition Bonds. Petitioner states that these objectives should result in lower interest costs and, thus, savings to ratepayers.

b. Recovery of Upfront Transaction Costs

In order to issue Transition Bonds to achieve net savings for the benefit of its customers, Petitioner will incur transaction costs. Based on the currently estimated initial offering of $2.525 billion of Transition Bonds, Petitioner has

estimated that such amount will include Upfront Transaction Costs of approximately $25 million which may vary, in part, based on the factors described below. Petitioner states that these Upfront Transaction Costs will include, among other items, the underwriting spread, rating agency fees, financial advisory fees, accounting fees, SEC registration fees, printing and marketing expenses, trustees' fees, legal fees, the servicing set-up fee and the administrative cost to set up the SPE. The Petitioner has requested authority to recover the Upfront Transaction Costs out of the proceeds of sale of the Transaction Bonds and to include such costs as Bondable Stranded Costs, the right to recover such amounts to constitute a portion of the Bondable Transition Property. Petitioner indicates that to the extent payment of any Upfront Transaction Costs is required prior to the issuance of the Transition Bonds, such costs will be paid by Petitioner and reimbursed from the proceeds of the Transition Bonds.

c. Recovery of Capital Reduction Costs

Petitioner has requested recovery of the Bondable Stranded Costs of retiring Petitioner's debt or equity, or both, including but not limited to, accrued interest and accrued preferred dividends, premium and other fees, costs and charges relating thereto out of the proceeds of the sale of the Transition Bonds and to include such costs as Bondable Stranded Costs, the right to recover such amounts to constitute a portion of the Bondable Transition Property

d. Recovery of Ongoing Transition Bond Costs

Petitioner has requested recovery of Ongoing Transition Bond Costs through the Transition Bond Charge. Petitioner states that the primary Ongoing Transition Bond Costs are principal and interest on the Transition Bonds, and that other such costs include principally the servicing fee of .05% of the initial principal amount of the Transition Bonds (the "Servicing Fee") paid to Petitioner, as the Servicer (as defined below), or such higher fee as may be payable to a successor Servicer, and the ongoing cost of credit enhancement,

overcollateralization and hedging arrangements, if any. Petitioner states that there will also be a small amount of additional, ongoing costs associated with the Transition Bond Transaction, such as the administration fee, legal and accounting fees, directors or manager fees, rating agency fees, trustee fees and other costs of operating the SPE. Petitioner states that these costs should be included as Bondable Stranded Costs to be recovered through the Transition Bond Charge in accordance with Section 14 of the Act, and the right to recover these costs as Bondable Stranded Costs will be a portion of the Bondable Transition Property.

e. Approval of Final Terms and Conditions: Transition Bond Transaction

Petitioner states that prior to the pricing of the Transition Bonds, it will cooperate with and provide such information to the Board's Designee as is reasonably requested in order that the Designee may make the certifications required below. To assist the Designee in making his required certifications, upon the pricing of the Transition Bonds, the Petitioner will file with the Board's Designee a Pricing Advice Certificate (see Appendix D to this Financing Order). This document may be based upon the advice of the Petitioner's lead underwriter and will certify, in substance, that the structuring and pricing of the Transition Bonds (including any hedging arrangement priced at the time of pricing of the Transition Bonds as described below), assures that the Petitioner's customers pay the lowest transition Bond Charges consistent with then current market conditions and the terms of this Financing Order.

Petitioner also states that prior to the approval of pricing of the Transition Bonds (including any hedging arrangement priced at the time of the pricing of the Transition Bonds), the Designee will receive a certificate from Petitioner's lead underwriter substantially to the effect that, in its judgment, the structuring and pricing of the Transition Bonds (and any such hedging agreement) is reasonable in the light of current market conditions. Upon the filing of the Pricing Advice

Certificate (at the time of the pricing of the Transition Bonds and any such hedging arrangement), Petitioner requests that the Board's Designee will file with the Board a certificate (see Appendix A hereto) to the effect that the structure and pricing of the Transition Bonds (and any such hedging arrangement) assures that Petitioner's customers pay the lowest Transition Bond Charges consistent with market conditions and the terms of the Financing Order, and approving the terms and conditions of the Transition Bonds (and any such hedging arrangement), including scheduled amortization up to 15 years and stated maturities of up to two additional years.

Petitioner states that payments on the Transition Bonds will be semiannual or quarterly, depending upon rating agencies, tax considerations and market conditions at the time of Transition Bond pricing, and that debt service on the Transition Bonds will be scheduled upon issuance so that the sum, for each annual period, of (i) the Periodic Payment Requirements (defined below) and (ii) the associated MTC-Tax collections will result in substantially equal Transition Bond Charges.

Petitioner states that one or more classes of the Transition Bonds may be issued as variable rate instruments which are fixed or capped through the execution of an interest rate exchange agreement, an interest rate cap agreement or similar hedging arrangement. If, at the time of pricing of the Transition Bonds, the Petitioner and its lead underwriter determine that such a hedging arrangement is expected to result in a lower interest cost on such classes of bonds or on all classes of bonds taken as a whole, the hedging arrangement will be described in the Pricing Advice Certificate (see Appendix B hereto) and is subject to approval by the Designee in the Issuance Certificate. Any counterparty to such a hedging arrangement must have a credit rating consistent with achieving the highest possible ratings on the Transition Bonds.

Petitioner has also advised the Board's Staff and the Board's financial advisor that it may be advantageous, under

certain market conditions, to enter into a hedging arrangement in order to attempt to synthetically fix or cap interest rates on the Transition Bonds in advance of the actual pricing of the Transition Bonds. Petitioner also stated that the implementation of a hedging arrangement in advance of the pricing of the Transition Bonds should only be undertaken if Petitioner determines and certifies to the Board Designee, that such an arrangement is appropriate to assure that Petitioner can achieve the required rate reductions through securitization and to protect ratepayers against future interest rate increases.

Because there is no market for hedging Transition Bonds directly, Petitioner has advised Board Staff that any hedging arrangement may not provide a "perfect" hedge against interest rate volatility. Petitioner has further advised Board Staff that in order to hedge the risk of changes in the interest rates prior to the pricing of the Transition Bonds, it is necessary to make reference to rates and spreads in other markets, including the United States Treasury Bond market and the interest rate swap market. Petitioner has further advised that it may itself enter into hedging arrangements with one or more third party counterparties and enter into a back-to-back hedging arrangement with the SPE.

Petitioner has also advised that payments from or to one or more of the third party counterparties with whom Petitioner or the SPE enters into a hedging arrangement prior to the pricing of the Transition Bonds in order to fix or cap interest rates shall be treated as follows: If a payment is received by Petitioner and/or the SPE from the third party counterparties, Petitioner and/or the SPE would retain such amount (or an estimate of such amount if the exact amount is unknown at the time of pricing of the Transition Bonds) after any current income taxes and the principal amount of the Transition Bonds will be correspondingly reduced. In the event the actual payment received from the hedging arrangement at the time of issuing the Transition Bonds does not equal the amount by which the Transition Bond issuance was reduced,

the difference would be recovered by the Petitioner and/or SPE or credited to ratepayers as an adjustment to Ongoing Transaction Costs and reflected in the initial Transition Bond Charge.

If a payment must be made by Petitioner and/or the SPE to the third-party counterparties, such payment, or any portion thereof, net of tax, may be included in Transaction Costs and securitized provided the total amount securitized, (i.e., the $2.4 billion of net-of-tax stranded costs, plus Capital Reduction and Upfront Transaction Costs expressed on a net of tax basis to the extent they are deductible when incurred) [illegible] $2.525 billion. Alternatively, at the discretion of the Petitioner and/or SPE, the payment to any counterparty by the SPE may be amortized over the term of the Transition Bonds and, together with interest determined at the weighted average yield on the Transition Bonds, included as part of Ongoing Transaction Costs and remitted to Petitioner or another counterparty.

Petitioner suggests that any periodic payment of Ongoing Transaction Costs by SPE to Petitioner related to such a hedging arrangement may be made subordinate to the payments of Transition Bonds.

Petitioner has requested that if a hedging arrangement is entered into prior to the pricing of the Transition Bonds, the hedging arrangement will be approved by the Designee by the execution and delivery to the Petitioner of a Designee Confirmation which will describe and approve the structuring and pricing of the hedging arrangement. Upon the delivery to the Petitioner of such Designee Confirmation, the terms of any hedging arrangement, including the terms of the Transition Bonds which are assumed as part of such hedging arrangement, shall be final and incontestable, and shall not be subject to further review or approval by the Designee upon the pricing of the Transition Bonds. The Designee

Certification shall be filed by the Designee with the Board at the same time the Designee files the Designee Certification approving the pricing of the Transition Bonds. The Designee shall also approve and certify the terms for the termination of any hedging arrangement.

Not later than five business days after the issuance and sale of the Transition Bonds, Petitioner will confirm to the Board, in an "Issuance Advice Letter" substantially in the form of Appendix B to this Financing Order, the actual interest rates on the Transition Bonds, the schedule of payments of principal and interest on the Transition Bonds and the expected amortization schedule and the initial Transition Bond Charge and MTC-Tax, which will be calculated using the formula described in Exhibit A of the Petition. The Issuance Advice Letter will also include a calculation of present value savings to customers using the methodology employed in Appendix H hereof, applied to the actual structure and terms of Transition Bonds. Pursuant to Section 15(a)(2) of the Act the initial Transition Bond Charge and MTC-Tax will become effective when the Issuance Advice Letter is filed, without further action by the Board.

f. Transition Bond Charge

Pursuant to Section 15 of the Act, Petitioner states that Transition Bond Charges will be set periodically by formula at a level intended to recover the sum of the Ongoing Transition Bond Costs, including, without limitation: (1) the principal of the Transition Bonds projected amortization in accordance with the expected before the time of schedule approved by the Designee at or on the Transition pricing of the Transition Bonds and financing Order; (2) Bonds authorized by the Board in this Financing the costs of operating and administering the SPE; (3) the costs of servicing the Transition Bonds, including servicing and trustee fees, expenses and indemnities substantially as described in the SPE filing; (4) amounts required to fund or replenish the overcollateralization account in accordance with the overcollaterization schedule approved by the Board's Designee at pricing of the Transition Bonds; (5) the

reimbursement of any amounts required to be drawn from the SPE's capital account pursuant to the Bond Indenture, substantially as described in the SEC filing; and (6) the ongoing expenses of any other credit enhancement or hedging arrangements (the required periodic payment of all such amounts, including deficiencies on past due amounts for any reason, is herein called the "Periodic Payment Requirement" and the total of such requirements until paid in full, the "Total Payment Requirements").

In Attachments A3 and A4 to Exhibit A of the Petition, the Petitioner describes the formula by which it proposes to periodically establish and adjust the Transition Bond Charge and the MTC-Tax. Petitioner states that the Transition Bond Charges and the MTC-Tax will be set and adjusted based on assumptions described in Attachments A3 and A4 to Exhibit A of the Petition, as those assumptions are adjusted periodically in accordance with Attachments A3 and A4 to Exhibit A. These assumptions include, but are not limited to, sales forecasts, customer payment and charge-off patterns, defaults by third party suppliers (as described herein), the Periodic Payment Requirement (including without limitation the timely payment of principal of and interest and acquisition or redemption premium on, the Transition Bonds) and tax rates. In Attachment A2 to Exhibit A of the Petition, Petitioner projected the initial Transition Bond Charge and the MTC-Tax using the formula described in Attachments A3 and A4 to Exhibit A to the Petition and assuming the Periodic Payment Requirements as shown in Revised Attachment Al to Exhibit A of the Petition which is attached hereto as Appendix I.

Petitioner requests that the Transition Bond Charges shall remain in effect until the SPE owner of the Bondable Transition Property has received Transition Bond Charges sufficient to discharge the Total Payment Requirements.

Petitioner states that each customer's monthly bill will contain a line item which includes both the Transition Bond Charge and MTC-Tax and will note in text or contain a

footnote that a portion of such combined charge represents Bondable Transition Property being collected on behalf of the SPE as owner of Bondable Transition Property.

g. Periodic Adjustments to the Transition Bond Charge and MTC-Tax

The Board is required by Section 15 of the Act to make mandatory periodic adjustments (the "True-Up Mechanism") to the Transition Bond Charge upon petition of Petitioner, its assignee or financing entity, to ensure receipt of revenues sufficient to satisfy the Periodic Payment Requirement. Under the Act, mandatory periodic adjustments of Transition Bond Charges must be made at least annually. As described earlier, such adjustments will be based upon a formula described in Attachments A3 and A4 to Exhibit A of the Petition. Each such adjustment shall be formula-based, shall be in the amount required to ensure receipt of revenues sufficient to satisfy the Periodic Payment Requirement, including, without limitations the timely payment of principal of, and interest and acquisition or redemption premium on, the Transition Bonds. As Servicer, Petitioner states that it will be responsible for filing with the Secretary of the Board documentation for any necessary periodic adjustments (see Appendix C hereto). (Petitioner, as Servicer under the Servicing Agreement, described below, and any successor to Petitioner as servicer are herein referred to as the "Servicer".)

Petitioner has requested authorization to file for adjustments of the Transition Bond Charge, as often as quarterly, as determined necessary by Petitioner for credit rating purposes. Each such periodic adjustment shall become effective 30 days after filing thereof with the Board absent a determination by the Board of manifest error (i.e. an arithmetic error evident on the face of such filing). Under Section 15 of the Act, the Servicer shall propose such adjustments in a filing with the Secretary of the Board at least 30 days in advance of the date upon which it is requested to be effective. The proposed adjustment shall become effective on an interim basis on such requested effective date, in the

absence of a Board Order to the contrary. Under Section 15 of the Act, in the absence of a Board order to the contrary, the periodic adjustment shall become final 60 days after the filing. The Petitioner has requested that the Board confirm that the periodic adjustment will become final absent a finding by the Board of manifest error as defined above in the application of the adjustment formula approved herein. The Petitioner asserts that this standard is consistent with the other provisions of Section 15 which require that the periodic adjustment be implemented to ensure "timely payment" of, among other things, principal of and interest and acquisition or redemption premium on the Transition Bonds. Petitioner further asserts that in order to achieve the highest possible credit ratings on the Transition Bonds and, thus, the lowest costs to ratepayers, the periodic adjustments must be made final based upon this objective standard.

As provided in the Restructuring Order, the MTC-Tax is subject to periodic review and adjustment Petitioner proposes that the adjustment is to be made as often as quarterly to reconcile the income taxes recovered to the income taxes required to be paid on the taxable net revenue as calculated in accordance with Exhibit A to the Petition from the Transition Bond Charges and the MTC-Tax. Petitioner requests that the reconciliation be made at the same time and substantially in the same manner as the True Up Mechanism for Transition Bond Charges in order to ensure receipt of revenues sufficient to assure that the MTC-Tax is not being underrecovered or overrecovered. Upon petition of Petitioner, the MTC-Tax will be adjusted based upon assumptions described in Attachments A3 and A4 to Exhibit A to the Petition, as those assumptions are adjusted from time to time in accordance with such Attachments A3 and A4. No delay in the mandatory adjustment or failure to make any such adjustment of the MTC-Tax will in any way adversely affect the mandatory periodic adjustment of the Transition Bond Charge described in the preceding paragraph.

The Petitioner has also requested authority for the Servicer to make "non-routine" filings for adjustments to the formula described in Exhibit A of the Petition to assure timely payment of the Total Payment Requirements, including principal and interest on the Transition Bonds. These filings would be made to accommodate changes to the formula described in Attachments A3 and A4 to Exhibit A, if deemed appropriate by the Servicer to protect bondholders to remedy a significant and recurring variance between actual and expected Transition Bond Charge collections. Any such filing would be required to be made with the Secretary of the Board at least 90 days prior to the proposed effective date, and would be subject to Board approval.

h. Remittance of Transition Bond Charges

Petitioner states that the Servicer will employ a methodology to remit to the Transition Bond trustee ("Bond Trustee") the Transition Bond Charge as described in the Petition and in Exhibit C thereto. Petitioner notes that the Servicer will receive the Transition Bond Charge collections daily and may, as authorized by Section 15 of the Act, commingle Transition Bond Charge collections with other customer payments until the remittance date to the Bond Trustee.

Petitioner states that collections from each customer will be applied first to sales taxes (which Petitioner will collect as trustee for the State and not for its own account or that of the SPE, and which are not "charges" for purposes of the following allocations), then to charges in arrears, if any, and then to current charges. With respect to each billing period, partial payments of charges will be allocated to the Transition Bond Charge, to the MTC-Tax and to the Petitioner's other charges, pro rata, based on the proportions that the Transition Bond Charges, the MTC-Tax and the Petitioner's other charges bear to the total charges collected. Partial payments of Transition Bond Charges will be allocated to the SPE (as owner of the Bondable Transition Property), pro rata, based on the proportions that the Transition Bond Charge

representing the Bondable Transition Property and any transaction bond charges established pursuant to other subsequent financing orders bear to the total Transition Bond Charges collected. Subsequently, the Petitioner advised the Board that it would file, as part of its required Unbundling Filing of August 1, 2002, data showing the impact of the timing of customer payments of Transition Bond Charges to the Petitioner versus payments by the Petitioner as Servicer to the transition bond trustee. This data shall include a calculation of customer daily remittances, timing of remittances to the bond trustee and the short-term interest rate then applicable to determine the amount of "float" income earned by the Petitioner in its capacity as Servicer. If the Board determines in its review of this filing, that the Petitioner retained revenue over and above its servicing fee, it may calculate such retained revenue, and impute interest thereon, in determining fair and reasonable rates going forward from the date of its review.

Petitioner says that the Bond Trustee will apply Transition Bond Charge collections substantially as described in the SEC filing. Thus, investment income earned on the trust accounts held by the Bond Trustee may be used to satisfy current Periodic Payment Requirements. Investment income on the capital account not used currently for these purposes will be released to the SPE. Any earnings in excess of required balances in such trust accounts (other than the capital account) will reduce the Transition Bond Charges through the True-Up Mechanism.

Upon retirement of all outstanding Transition Bonds and payment of all Ongoing Transition Bond Costs, Petitioner states that any remaining amounts held by the Bond Trustee will be released to the SPE and that Petitioner's equity in the SPE may be distributed to Petitioner, Petitioner also says that it will credit an amount equal to any overcollected Transition Bond Charges, less any amount of any unpaid MTC-Tax charges and any amount that was withdrawn and not

replenished to the SPE's equity, to its customers against its distribution charges.

i. Credit Enhancement

The Transition Bond documents will incorporate the True-Up Mechanism authorized by Section 15 of the Act as described above and overcollateralization amounts or other means of credit enhancement as required by the rating agencies or taxing authorities.

The Petitioner explains that the Transition Bond Charge will be set to collect an overcollateralization amount over time in addition to the principal (in accordance with the expected amortization schedule) and interest payable on the Transition Bonds and the other Ongoing Transition Bond Costs. The Petitioner states that the overcollateralization amount necessary for the Transition Bonds will be determined just prior to pricing, after consultation with the rating agencies and tax authorities, and will be subject to the approval of the Designee at the time of pricing of the Transition Bonds. As with other components of the Transition Bond Charge, the overcollateralization component will be incorporated into each periodic adjustment to the extent necessary using the True-Up Mechanism.

j. Formation of SPE

The SPE will be a wholly-owned, non-utility subsidiary of the Petitioner and is expected to be a limited liability company, and will be managed substantially as described in the SEC Filing.

k. Bondable Transition Property

Under Section 3 of the Act, the Petitioner's Bondable Transition Property (the "Bondable Transition Property") will consist of (a) the irrevocable right to charge, collect and receive, and be paid from collections of the Transition Bond Charge the amount necessary to provide for the full recovery of Total Payment Requirements, (b) all rights of Petitioner under this Financing Order, including without limitation all

rights to obtain periodic adjustments of the Transition Bond Charge pursuant to the True-Up Mechanism and (c) all revenues, collections, payments, money and proceeds arising under, or with respect to, all of the foregoing.

Pursuant to Sections 16 and 22 of the Act, upon receipt of payment for the Bondable Transition Property by the Petitioner from the SPE, the Bondable Transition Property will constitute a vested presently existing property right and will continuously exist as property for all purposes as provided in the Act and the Financing Order, whether or not the revenues and proceeds arising with respect thereto have accrued and notwithstanding the fact that the value of the property right may depend upon eonsumers using electricity or the Servicer performing services; and the validity of any sale, assignment or other transfer of the Bondable Transition Property will not be defeated or adversely affected by the commingling by Petitioner of revenues recovered from amounts charged, collected and received on account of the Bondable Transition Property with other funds of Petitioner.

l. Sale of Bondable Transition Property to SPE

Petitioner requests the Board to approve the sale of the Bondable Transition Property to an SPE in one or more transactions which, under Section 23 of the Act, will be a legal true sale and absolute transfer to the SPE, notwithstanding any other characterization for tax, accounting or other purposes. The Petitioner explains that the SPE will have all of the rights originally held by Petitioner with respect to the Bondable Transition Property, including the right to exercise any and all rights and remedies to collect any amounts payable by any customer in respect of the Bondable Transition Property, which includes the right to direct Petitioner or any successor electric public utility to shut-off electric power to the extent permitted in accordance with law and any applicable regulations.

The Petitioner notes that the agreement in connection with the sale and transfer of the Bondable Transition Property

to the SPE will include representations and warranties with respect to, among other things, the validity of this Financing Order, the Bondable Transition Property and the title thereto, and provide specific covenants, indemnities and/or repurchase obligations in connection with such transfer for the benefit of the holders of Transition Bonds.

m. Issuance of Transition Bonds

The Board is requested to approve the issuance of Transition Bonds by the SPE. The Petitioner states that the Transition Bonds will, by their terms, be recourse only to the SPE's credit and assets, and will be secured by a pledge of all of the rights, title and interest of the SPE in its Bondable Transition Property and Other SPE Collateral.

n. Nonbypassable Transition Bond Charge and MTC-Tax

The Transition Bond Charge and MTC-Tax are nonbypassable and will be assessed against and collected from all customers of the Petitioner or any successor electric public utility, except as provided in Section 28 of the Act, within the Petitioner's service area as of the date of the Petition until the Total Payment Requirements are discharged in full. Pursuant to Section 18 of the Act, the Transition Bond Charge will apply equally to each customer, regardless of class, based on the amount of electricity delivered to the customer through the transmission and distribution system of Petitioner or any successor electric public utility that takes over all or a portion of the Petitioner's service area, including electricity sold to customers by any third party supplier, as described below.

o. Third Party Suppliers

The Petitioner states that billing, collection and remittance of Transition Bond Charges by a third party supplier ("TPS") may increase the risk of shortfalls in Transition Bond Charge and MTC-Tax collections by exposing the cash flow to potential interruption due to the

default, bankruptcy or insolvency of the TPS. It notes that this risk of interruption will increase risks to investors and ratepayers, potentially increasing the required credit enhancement or reducing the credit rating and increasing the rate of interest on Transition Bonds. The Petitioner concludes that such TPS billing may increase the Transition Bond Charge and MTC-Tax component resulting from interruption or delay in payment.

In order to mitigate against these risks, satisfy rating agency concerns and reduce the cost to ratepayers, Petitioner requests that any TPS should be required to comply with certain billing, collection and remittance procedures and information access requirements described in the Petition and comparable to those in effect in other states in which stranded cost securitizations have been effected. The Petitioner indicates that these requirements are largely derived from rating agencies' criteria, as described in Exhibit D of the Petition.

p. Servicing

Petitioner states that it will enter into a servicing agreement with the SPE to perform servicing functions on behalf of the SPE with respect to the Bondable Transition Property, which, servicing engagements, including servicing compensation, will be substantially as described in the SEC filing.

q. MTC-Tax Component Recoveries

Pursuant to the Restructuring Order, Petitioner has been authorized to recover fully the MTC-Tax Component through the ongoing collection of the MTC-Tax until full payment of principal and interest of the Transition Bonds. Pursuant to the Restructuring Order, the MTC-Tax is subject to mandatory periodic adjustment (at the same time and substantially in the same manner as the Transition Bond Charges) to reconcile the MTC-Tax collections with the Federal Income and State Corporate Business taxes required to be paid on the taxable revenue as calculated in accordance with Exhibit A to the

Petition from the Transition Bond Charge and the MTC-Tax. The Petitioner will maintain separate accounting for the MTC-Tax collections and the Bondable Transition Property. As provided in Section 23(a)(4) of the Act, Petitioner's right to recover the MTC-Tax by Petitioner will in no way affect or impair the legal true sale and absolute transfer of the Bondable Transition Property to the SPE, or otherwise affect the legal rights and attributes of the Bondable Transition Property under the Act.

3. RATEPAYER BENEFITS

Based upon its most recent rate case, Petitioner has a pre-tax rate of return of 14.23%, which is equivalent to an after-tax rate of return of 8.42%. Based upon the structure, methodology and assumptions as set forth in the letter of Petitioner to the Board dated September 2, 1999 ("September 2, 1999 Letter") and in Appendix H hereof, Petitioner represents that, as proposed, the Transition Bond Transaction will result in net present value savings over the term of the Transition Bonds and greater rate reductions than would be required to recover the recoverable stranded costs if Transition Bonds were not issued. Petitioner states that the actual net present value savings and rate reductions resulting from the Transition Bond Transaction will depend upon the actual amount of Transition Bonds issued, market conditions at the time of the pricing of the Transition Bonds (and any hedging arrangement), and the actual amount of Bondable Stranded Costs. The structure, pricing, terms and conditions of the Transition Bonds (and any hedging arrangement) will be subject to approval by the Designee pursuant to the delegation of authority in this Financing Order. In its Issuance Advice Letter filed with the Board following the pricing of the Transition Bonds, the Petitioner will present a calculation of the expected net present value savings and rate reductions resulting from issuance of the Transition Bonds using the methodology described in the September 2, 1999 Letter and based upon the findings in the Restructuring Order and the rate reductions prescribed in the Act.

4. USE OF PROCEEDS

The Petitioner states that the proceeds, net of underwriting discount, from the sale of Transition Bonds will be remitted to Petitioner in consideration of Petitioner's sale of Bondable Transition Property. In accordance with Section 14 of the Act, Petitioner will use such proceeds, after payment of Upfront Transaction Costs, to reduce its $2.4 billion net of tax bondable stranded costs through the retirement of debt or equity, or both (including transactions completed after the date of this Order).

5. RATEPAYER ADVOCATE'S COMMENTS

As noted in the procedural history set forth hereinabove, by letter memorandum dated August 11, 1999, the Ratepayer Advocate ("Advocate") filed comments in response to Petitioner's filing in this matter. The Advocate's primary argument was that evidentiary hearings were required given the nature of the issues in dispute in this matter. At its public meeting dated August 24, 1999, memorialized by Board Order dated September 17, 1999, the Board ruled that it would not be necessary to hold evidentiary hearings with regard to the issues raised by the Advocate's memorandum except that it held two issues, issues XI and XII, in abeyance until further review. The Board also referred to correspondence of Petitioner dated August 24, 1999 setting forth proposals for resolving issues IX and X. The Board determined that no hearings were necessary with regard to issues IX and X and indicated it anticipated that the Petitioner's proposals with regard to these issues would adequately address the Ratepayer Advocate's concerns. We note that the Ratepayer Advocate has submitted no further correspondence with regard to Petitioner's proposals on issues IX and X, nor any other comments with regard to the Restructuring Order.

1. The Advocate argues in issue IX of its memorandum that Petitioner's proposal does not adequately take account of interest earned (the "float") by Petitioner on

monies held between the time Petitioner receives customer payments and the time it remits said payments to the SPE, and that the failure to flow this interest back to customers is contrary to the Act's mandate calling for the lowest possible Transition Bond Charges with all savings passed along to customers. The Advocate also argues that given the lack of certainty as to when Petitioner will file its next rate case, it is not a solution to wait until Petitioner files a base rate case. The Advocate concludes that the Board should order that Petitioner flow back to ratepayers the benefit of the float accruing between the dates Petitioner collects the Transition Bond Charges and related MTC-Tax and the date the money collected is remitted to the SPE.

As noted above, by letter dated August 24, 1999, Petitioner filed with the Board an alternative proposal regarding how it will handle the above referenced float. This proposal is set forth in Point IX of Attachment A to Petitioner's August 24, 1999 letter, and is as follows:

> The Company is directed to file, as part of its required Unbundling Filing of August 1, 2002, data showing the impact of the timing of customer payments of transition bond charges to PSE&G versus payments by PSE&G as Servicer to the transition bond trustee. This data shall include a calculation of customer daily remittances, timing of remittances to the bond trustee and the short-term interest rate then applicable to determine the amount of "float" income earned by PSE&G in its capacity as Servicer. If the Board determines in its review of this filing, that PSE&G retained revenue over and above its servicing fee, it may calculate such retained revenue, and impute interest thereon, in determining fair and reasonable rates going forward from the date of its review. [Attachment A to Petitioner's letter filed August 24, 1999]

After review, the Board FINDS that the foregoing proposal is a reasonable resolution of issue IX of the

Advocate's memorandum. Allowance for consideration of the impact of the float on rates in the unbundling filing of August 1, 2002 provides a reasonable means of examining any rate treatment which may be appropriate because of the float.

2. The Advocate argues in issue X of its memorandum that Petitioner's proposal to include in transaction costs the recovery of accrued interest on redeemed debt and accrued dividends on redeemed preferred equity amounts to a double recovery for Petitioner because ratepayers are already fully compensating investors through current base rates. The Advocate concludes that the Board should state in its Order that accrued interest and dividends are costs that Petitioner has already collected in base rates, and that these costs should be excluded from transaction costs.

Point X of Attachment A of Petitioner's August 24, 1999 letter filing contains Petitioner's proposed resolution of issue X, which states as follows:

> As reflected in the Company's Reply of August 13, 1999 to Point X of the Ratepayer Advocate's Memorandum of August 11, 1999, accrued interest on bonds and accrued dividends on preferred securities will be calculated from the time transition bonds are issued until the time the related bonds/preferred stock is retired/redeemed. Only this amount of accrued interest and dividends will be included in the estimated $125 million of transaction costs to be recovered through the transition bond issuance. If the Company's transaction costs are below $125 million in the aggregate, the excess will be applied as a reduction of the Company's SBC deferred balance.
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> [Attachment A to Petitioner's letter filed August 24, 1999]

After review, the Board finds that the above proposal provides a reasonable resolution of issue X of the Advocate's

Memorandum. As of the date of th
Transition Bonds the accrued interest and
will no longer effectively be recove
Therefore, any charge to customers a
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3. Issue XI of the Advocate's Me
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In its Reply to the Advocate's M
August 13, 1999, Petitioner argues that the
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really solve the problem because the true-up mechanism would increase the customer charge in a similar fashion to that proposed by Petitioner.

As a preliminary matter, it appears after a review of the arguments set forth above and an examination of the record regarding the billing lag issue, that an evidentiary hearing is not necessary for the Board to rule on this issue. It is clear from the record and from the arguments presented that there is indeed a billing lag for the term of the Transition Bonds which must be covered by revenues sufficient to service the Transition Bonds. See, Section 15(b) of the Act,. The only remaining issue is how best to account for the lag in customer payments through the Transition Bond Charges and related charges. Because Petitioner's proposal adequately accounts for the lag through the Transition Bond Charge calculation shown in Attachment A-2 to the Petition and through Petitioner's agreement to credit any overcollected Transition Bond Charges to its customers, with the added benefit of fully funding the Transition Bonds, the Board FINDS Petitioner's approach to be reasonable.

4. With regard to issue XII, the Advocate argues that Petitioner has not provided back-up documentation to support a servicing fee of 0.05% for collecting the Transition Bond Charges payments from customers and transmitting same to the SPE. The Advocate also argues that while it may be true that it would cost considerably more for an outside entity to do the servicing, the cost to Petitioner is only an incremental service without the need for a newly created billing and collection procedure. The Advocate concludes that the servicing fee must be demonstrated and justified and that the Board should at least cap the servicing fee at no more than 0.05% for the first year, with a review of the fee a year from the beginning date of the collection of the Transition Bond Charges.

Petitioner argues in its August 13,1999 Reply that the 0.05% servicing fee represents Petitioner's best estimate of the costs to bill, collect, account for and remit to the SPE,

along with the cost to make the various changes to the accounting system and produce various reports for the trustee, bondholders, rating agencies and the Board.

Petitioner also argues that the servicing fee has been calculated on an arms length basis to protect the bankruptcy remote nature of the transaction. Petitioner asserts that the fee is also one of the lowest fees used by other utilities that are presently servicing securitization requirements. Finally, Petitioner notes that the servicing will be adjusted in its next electric base rate proceeding.

After review, the Board FINDS that the proposed servicing fee of 0.05% is as low as any servicing fee charged by any other utility in the nation in connection with a securitization of comparable size and complexity and is, therefore, reasonable. Moreover, the Board will review in Petitioner's next electric base rate proceeding such servicing compensation to assure that the servicing fee is market-based and provides a reasonable return.

6. FINDINGS WITH RESPECT TO PETITION

Based on the record of proceedings in this matter and those related to the Restructuring Order, the Petition and the provisions of the Act and the Restructuring Order, the Board **HEREBY FINDS:**

Recovery of Costs

1. As approved by the Board in BPU Docket Nos. E097070461, E097070462 and E097070463 (which approval constitutes the "Restructuring Order"), Petitioner is authorized to recover up to $2.940 billion net of tax stranded costs.

2. Petitioner's net of tax stranded costs to be securitized approved in the Restructuring Order are $2.4 billion plus an additional amount of up to $125 million for transaction costs are recoverable through the Transition Bond

Charge. In addition, the Restructuring Order permits the recovery of the Federal Income and State Corporate Business taxes related to securitization (i.e., the MTC-Tax Component), which are reflected in the grossed-up revenue requirement number associated with the $2.4 billion in net of tax stranded costs.

3. The Petitioner's Bondable Stranded Costs include: (1) the Capital Reduction Costs, (2) the Upfront Transaction Costs and (3) the Ongoing Transition Bond Costs.

Mitigation

4. In the Restructuring Order the Board found, in accordance with Section 14(b)(1) of the Act, that Petitioner has taken reasonable measures to date, and has the appropriate incentives or plans in place to take reasonable measures, to mitigate the total amount of its stranded costs.

Necessity of Securitization

5. In the Restructuring Order the Board found, in accordance with Section 14(b)(2) of the Act, that Petitioner will not be able to achieve the level of rate reduction deemed by the Board to be necessary and appropriate pursuant to the provisions of Sections 4 and 13 of the Act absent the issuance of the Transition Bonds.

Tangible Benefits

6. In accordance with Section 14(b)(3) of the Act, so long as the weighted average yield on the Transition Bonds is less than 9.0%, the issuance of such Transition Bonds will provide tangible and quantifiable benefits to ratepayers, including greater rate reductions than would have been achieved absent the issuance of Transition Bonds and net present value savings over the term of the Transition Bonds. Petitioner has advised the BPU Staff that it will exercise its best efforts to achieve an effective weighted average yield on the Transition Bonds significantly less than 9.0%.

7. The methodology used, including an after-tax return of 8.42% as determined in Petitioner's most recent rate case, to calculate expected net present value savings as described in Appendix H hereof is reasonable.

8. A substantially level per kilowatt-hour charge will permit Petitioner to achieve appropriate rate reductions and will increase net present value savings to ratepayers over the life of the Transition Bonds when compared to a substantially level annual charge. The formula used to calculate the initial Transition Bond Charge and the periodic adjustments thereto as described in Exhibit A (Attachments A-2 and A-3) of the Petition as filed, as well as the modifications to illustrate the application of the provisions of Section2(e) in the event a hedging arrangement were to be entered into prior to pricing the Transition Bonds and interest rates and/or the Transition Bond spread were to subsequently decline, are reasonable and adherence thereto will provide assurance that Customers will pay the lowest Transition Bond Charges consistent with market conditions and the terms of this Financing Order, in compliance with Section 14(b)(4) of the Act. The standard for the Board to use in making periodic adjustments of the Transition Bond Charge final is the absence of a manifest error (i.e., an arithmetic error evident on the face of the filing) in the application of the Transition Bond Charge adjustment formula, which standard the Board finds consistent with Section 15 of the Act and the achievement of the lowest possible interest cost on the Transition Bonds. The estimate of the initial Transition Bond Charge, determined in accordance with either Appendix H or Appendix I, attached hereto, is reasonable. The request of the Servicer to make non-routine adjustments of the Transition Bond Charge formula as described in paragraph 2(g) of this Financing Order is reasonable.

Structuring and Pricing: Hedging Arrangements

9. The procedures established in this Financing Order relating to the final approval of the structuring and pricing of the Transition Bonds (including any hedging arrangements

priced at the time of the pricing of the Transition Bonds) assure that, in accordance with Section 14(b)(4) of the Act, Petitioner's customers pay the lowest Transition Bond Charges consistent with market conditions and the terms of this Financing Order. As authorized herein by the Board and in full satisfaction of the requirements of Sections 14(b)(4) and 15(a)(3) of the Act, the structuring and pricing of the Transition Bonds (including any such hedging arrangement) will be conclusively deemed to satisfy the requirements of Section 14(b)(4), and the terms and conditions of the Transition Bond financing shall be conclusively approved if so certified by the Designee upon the pricing of the Transition Bonds and any such hedging arrangement.

10. The procedures proposed by the Petitioner, as set forth in Section 2(e) hereof, for the execution of a hedging arrangement prior to the pricing of the Transition Bonds are reasonable and consistent with the Act.

11. The formation of the SPE by Petitioner, the capitalization of the SPE by Petitioner, the sale by Petitioner to the SPE of its Bondable Transition Property, the providing of overcollateralization as described herein and as approved in the Designee Certification, and the entering into a servicing agreement, an administration agreement, a sale agreement, other agreements and transactions by Petitioner and the SPE substantially as described in the Petition and the SEC Filing and the hedging arrangements as described herein and in Appendix E herein are reasonable and necessary.

12. The methodology for the remittance of Transition Bond Charges as described in Exhibit C of the Petition will satisfy the requirements of Section 14 of the Act and is a reasonable means of undertaking the remittance of these charges.

13. The conditions to the resignation or replacement of the Petitioner as Servicer as described in the Petition are reasonable.

14. The Transition Bond Charge and MTC-Tax billing, collection and remittance procedures imposed upon any TPS as set forth in the Petition are reasonable.

15. Capital Reduction Costs, which do not include interest or preferred dividends accrued prior to the date of the issuance of the Transition Bonds, and the Upfront Transaction Costs, not to exceed $125 million in the aggregate, are reasonable.

16. The recovery of Ongoing Transition Bond Costs, including recovery of amounts owed under any hedging arrangement, as previously described herein is reasonable and consistent with the Act.

17. The scheduled amortization upon issuance for the Transition Bonds being up to 15 years and the stated maturity of the Transition Bonds being up to two additional years following the scheduled amortization are reasonable and permitted under the Act.

18. The issuance of series and classes of Transition Bonds by the SPE in an aggregate principal amount not to exceed $2.525 billion is reasonable and consistent with the Act and the Restructuring Order. The Financial Advisor, has advised the Board that, in its opinion, the negotiated sale of the Transition Bonds should be expected to provide a lower cost of funds than a competitive sale. Therefore, the negotiation of the sale of the Transition Bonds with Lehman Brothers on behalf of a group of underwriters is reasonable and serves the public interest.

19. The True-Up Mechanism to obtain adjustments to the Transition Bond Charge and the MTC-Tax described hereinabove and set forth in Appendix I hereof is reasonable.

Use of Proceeds

20. Petitioner's proposed application of the proceeds of the Transition Bonds as described in Petitioner's Quarterly Report to the SEC on Form 10-Q for the Quarter Ended June 30, 1999 is reasonable and consistent with the Act.

Regulatory Compliance

21. In light of the specific provisions of the Act governing the Transition Bond Transaction, Petitioner's petition is found to comply with N.J.A.C. 14:1-5.6 and -5.9, to the extent either might be deemed applicable.

22. Petitioner's undertaking with respect to amortization of discount, if any, on the Transition Bonds complies with N.J.A.C. 14:1-5.9A.

Periodic Adjustment of the MTC-Tax

23. The MTC-Tax should be subject to mandatory periodic adjustment at the same time and in substantially the same manner as adjustments to the Transition Bond Charge; provided, however, the Petitioner makes reasonable efforts to utilize any and all deductions to taxable income for which it may be eligible with respect to the securitization transaction, now or in the future, whether or not such deductions are contained in the formula presented by Petitioner in its Petition, so that the MTC-Tax Component does not result in the over-recovery or underrecovery of taxes to the Petitioner. The Board further finds that if a final determination is made related to the amortization of Investment Tax Credits, as described on Pages 112, 113 and 125 of the Restructuring Order, or if the amounts received for overcollateralization are prospectively determined by the Internal Revenue Service ("IRS") to be deductible, such formula shall be modified by Petitioner to incorporate any such determination.

7. ORDERS

Based on the foregoing, the record of proceedings on the Petition (including the incorporation of discovery requests and responses thereto, as requested by Petitioner in its Reply to the Advocate's Memorandum), and the provisions of the Act and the Restructuring Order, the Board HEREBY ORDERS:

1. The Petition for this Financing Order pursuant to Section 14 of the Act is approved subject to the terms and conditions stated herein.

2. In addition to Petitioner's Bondable Stranded Costs approved in part by the Board in the Restructuring Order, the Board hereby authorizes recovery of restructuring related costs consisting of: (1) the Capital Reduction Costs, (2) the Upfront Transaction Costs and (3) the Ongoing Transition Bond Costs, and hereby approves the formula for the calculation and adjustment of the Transition Bond Charge and the MTC-Tax Component in accordance with the Board's Findings herein.

Bondable Transition Property and Transition Bond Charges

3. The issuance of Transition Bonds by the SPE up to a maximum of $2.525 billion and the sale by the Petitioner of the Bondable Transition Property to the SPE are authorized.

4. The Transition Bond Charges will be assessed against all existing and future electric customers of Petitioner or any successor within the service area of Petitioner at the date of the Petition, except as provided in Section 28 of the Act, and will apply equally to each customer of Petitioner, regardless of class, based on the amount of electricity delivered to the customer (whether purchased from the Petitioner or a TPS) through the transmission and distribution system of Petitioner or any successor electric public utility who may take over all or a portion of the Petitioner's service area.

5. Transition Bond Charges will be set at a level sufficient to recover the Total Payment Requirements. The Transition Bond Charge and the MTC-Tax will remain in effect until the SPE, as owner of the Bondable Transition Property, has received Transition Bond Charges sufficient to recover the Total Payment Requirements and the MTC-Tax Component.

6. Pursuant to the Act, there is created and established for the benefit of Petitioner (or any assignee in accordance herewith) Bondable Transition Property consisting of the irrevocable right to charge, collect and receive, and be paid from collections of, the Transition Bond Charges in the amount necessary to meet the Total Payment Requirements, all rights of Petitioner to the Bondable Transition Property under this Order with respect to the Transition Bond Charges including without limitation all rights to obtain periodic adjustments of the Transition Bond Charges pursuant to Section 15 of the Act, and all revenues, collections, payments, money and proceeds arising under, or with respect to, all of the foregoing.

7. Pursuant to Section 16 of the Act, neither the Board nor any other governmental entity will have the authority, directly or indirectly, legally or equitably, to rescind, alter, repeal, modify or amend this Financing Order, to revalue, re-evaluate or revise the amount of Bondable Stranded Costs, to determine that the Transition Bond Charges or the revenues required to recover Bondable Stranded Costs are unjust or unreasonable, or in any way to reduce or impair the value of the Bondable Transition Property, nor shall the amount of revenues arising with respect thereto be subject to reduction, impairment, postponement or termination, provided, however, that nothing in this Financing Order will preclude adjustments of the Transition Bond Charges or the MTC-Tax in accordance with the provisions hereof and of Section 15 of the Act.

8. Pursuant to Section 16 of the Act, and notwithstanding any other provision of law, this Financing Order and the Transition Bond Charges authorized herein will become irrevocable upon the issuance of this Financing Order and its becoming effective pursuant to Section 19 of the Act. This Financing Order, the Transition Bond Charges and the Bondable Transition Property will constitute a vested, presently existing property right upon the transfer to an

assignee and receipt of consideration for such Bondable Transition Property.

9. Pursuant to Section 15 of the Act, until the Total Payment Requirements have been fully satisfied, this Financing Order and the authority to meter, charge, collect and receive the Transition Bond Charges and the MTC-Tax will remain in effect and Petitioner shall be obligated to provide electricity to its customers and will have the right to meter, charge, collect and receive the Transition Bond Charges, which rights and obligations may be assignable solely within the discretion of Petitioner.

Sale, Pledge and Assignment Of Transition Property

10. In accordance with the Act and as described in the Petition, Petitioner is authorized to sell, pledge or assign any or all of its interest in Bondable Transition Property that arises from this Financing Order directly, or indirectly through an assignee, to the SPE. The SPE is authorized to acquire the Bondable Transition Property and is approved and designated as a "financing entity" (as defined in Section 3 of the Act) for such purpose, and for the purpose of issuing Transition Bonds and pledging the Bondable Transition Property to the payment of the Transition Bonds.

11. The SPE will pay the purchase price of the Bondable Transition Property equal to the net proceeds from the issuance of the Transition Bonds directly or indirectly to Petitioner, to be applied substantially as described in the Petitioner's Second Quarter 10-Q dated August 16, 1999 and as set forth in ordering paragraph 36 of this Financing Order.

12. Upon the sale by Petitioner of the Bondable Transition Property to the SPE as described in this Financing Order, the SPE will have all of the rights originally held by Petitioner with respect to the Bondable Transition Property, including, without limitation, the right to exercise any and all rights and remedies, including the right to direct the Petitioner or any successor electric public utility to shut-off electric power to the extent permitted by law and any applicable

regulations, and to assess and collect any amounts payable by any customer in respect of such Bondable Transition Property, notwithstanding any objection or direction to the contrary by the Servicer.

13. Upon the sale by Petitioner of Bondable Transition Property to the SPE, Petitioner or any successor Servicer will not be entitled to recover the Transition Bond Charges other than for the benefit of the holders of Transition Bonds in accordance with Petitioner's duties as Servicer of such Bondable Transition Property as authorized in this Financing Order.

Transition Bonds

14. The scheduled amortization upon issuance of the Transition Bonds will be up to 15 years, and the stated maturity will be up to two additional years. The Transition Bonds may be issued in series and classes with different terms. Debt service on the Transition Bonds shall be scheduled upon issuance so that the sum, for each annual period, of (i) the Periodic Payment Requirements and (ii) the associated MTC-Tax will result in a substantially equal per kilowatt hour (kwh) charge. One or more classes of Transition Bonds may be issued as variable rate instruments, the interest on which is fixed or hedged in accordance with the terms of a hedging arrangement consistent with this Financing Order. In addition, Petitioner may, at any time after the issuance of this Financing Order, request that the Designee authorize a hedging arrangement as described in paragraph 2(e) herein to reduce interest rate risk.

15. The amount of Transition Bonds to be issued (not to exceed $2.525 billion) is approved as described herein. The final structure, pricing, terms and conditions of the Transition Bonds (including any hedging arrangement described in paragraph 2(e)) will, to the extent consistent with the provisions of this Financing Order, be determined by Petitioner and approved by the Board or its Designee pursuant to his delegation of authority from the Board, pursuant to

Sections 14(b)(4) and 15(a)(3) of the Act, at the time Transition Bonds are priced and/or any such hedging arrangement is entered into. The Designee may rely conclusively on the finding of the tangible and quantifiable benefits of securitization in Section 6 of Paragraph 6 hereof, as required by Section 14(b)(3) of the Act, upon the advice of the Board's Financial Advisor and upon information provided to the Designee by Petitioner to support any Designee Certification. Any Designee Certification shall be substantially in the Form of Appendix A hereto, shall constitute a part of this Financing Order, shall constitute a full and complete record of the determinations and approvals made therein and full satisfaction of the requirements of Sections 14(b)(4) and 15(a)(3) of the Act, and shall be final and uncontestable as of its date.

16. The issuance and sale of the Transition Bonds through negotiation with underwriters is approved.

Recovery of Bondable Stranded Costs

17. In accordance with Section 20 of the Act, Transition Bonds will be recourse only to the credit and assets of the SPE. Investment income earned on the trust accounts held by the Bond Trustee may be used to satisfy current scheduled interest and principal payments on the Transition Bonds and related expenses and to replenish the SPE's equity and the scheduled overcollateralization amount. Investment income in the capital account not used currently for this purpose will be released to the SPE. Any earnings in excess of amounts required to be held in such trust accounts (other than the capital account) will reduce the Transition Bond Charge annually through the True-up Mechanism.

18. The Capital Reduction Costs and Upfront Transaction Costs (including hedging costs permitted to be securitized as described in Section 2(e) hereof) up to $125 million in the aggregate are authorized to be recovered through the issuance of Transition Bonds.

19. The Ongoing Transition Bond Costs, including recovery of amounts owed under any hedging arrangement which are not securitized, as described herein are authorized to be recovered through the Transition Bond Charge. Provided, however, that the amounts owed to the Petitioner by the SPE under any hedging arrangements shall bear interest at the weighted average yield on the Transition Bonds and shall amortize on a pro rata basis with the amount of the Transition Bonds.

Reports

20. The Designee will make his determinations and approvals of the pricing of the Transition Bonds and/or any hedging arrangement described in paragraph 2(e) herein, upon receipt from the Petitioner of the Pricing Advice Certficate(s) substantially in the form of Appendix D hereto. Within two business days after the pricing of the Transition Bonds, the Designee shall file with the Secretary of the Board a Designee Certification(s) substantially in the form of Appendix A hereto. As provided in ordering paragraph 15 of this Financing Order, any Designee Certification will be final and uncontestable as of its date and will represent final approval, pursuant to Sections 14(b)(4) and 15(a)(3) of the Act, of the structure, pricing, terms and conditions of the Transition Bonds and/or any such hedging arrangement. No delay or error in such filing will affect the validity of this Financing Order, the Bondable Transition Property or the Transition Bonds.

21. Pursuant to Section 15 of the Act, not later than five business days after issuance and sale of the Transition Bonds, Petitioner will notify the Secretary of the Board, in an Issuance Advice Letter substantially in the form of Appendix B hereto, of the initial Transition Bond Charge and MTC-Tax (which are hereby approved), the expected amortization schedule approved in the Designee Certification and related matters. The Issuance Advice Letter will be automatically effective upon filing with the Secretary of the Board. No delay or error in such filing will affect the validity of this

Financing Order, the Bondable Transition Property or the Transition Bonds. Upon the filing of the Issuance Advice Letter, Petitioner will implement the rate reduction determined using the methodology set forth in Appendix H (Attachment 2), as required by Section 4(i) of the Act.

Servicing of Transition Bonds

22. Petitioner, as Servicer, is authorized, to enter into a servicing agreement, substantially as described in the SEC Filing, with the SPE pursuant to which Petitioner agrees to continue to operate its distribution system to provide service to its customers, to impose, charge, collect and receive Transition Bond Charges with respect to Bondable Transition Property for the benefit and account of such SPE or its assigns, and to account for and remit these amounts to or for the account of such SPE or its assigns in the manner described in Exhibit C of the Petition.

23. Each customer's bill will contain in text or in a footnote that a portion of the monthly charge represents Bondable Transition Property being collected on behalf of the SPE as owner of the Bondable Transition Property.

24. Collections from each customer will be applied first to sales taxes (which Petitioner will collect as trustee for the State and not for its own account or that of the SPE, and which are not "charges" for purposes of the following allocations), then to charges in arrears, if any, and then to current charges. With respect to each billing period, partial payments of charges will be deemed to constitute the Transition Bond Charge, the MTC-Tax and the Petitioner's other charges, pro rata, based on the proportions that the Transition Bond Charge, the MTC-Tax and the Petitioner's other charges bear to the total of such charges. Partial payments of Transition Bond Charges will be allocated to the owners of Bondable Transition Property, pro rata, based on the proportions that the Transition Bond Charge representing the Bondable Transition Property and any transition bond

charges established pursuant to other subsequent financing orders bear to the total transition bond charges.

25. Pursuant to Section 22 of the Act, in the event of a default by a Servicer under any Servicing Agreement with respect to Transition Bonds, upon application of the SPE or the Bond Trustee, the Board will designate a successor Servicer for the Bondable Transition Property, who will promptly assume billing and collection responsibilities for Transition Bond Charges and the MTC-Tax. The Board will act on an expedited basis to designate within 30 days such successor Servicer. Such successor Servicer will assume all rights and obligations of the initial Servicer.

26. The Board will only permit any successor Servicer to replace Petitioner as Servicer in any of its servicing functions with respect to the Transition Bond Charges and the Bondable Transition Property authorized by this Financing Order upon determining that approving or requiring such successor Servicer will not cause the then current credit ratings on Transition Bonds to be withdrawn or downgraded.

27. Any TPS that proposes to collect Transition Bond Charges or the MTC-Tax must (i) meet the creditworthiness criteria to be established by the Board, and at a minimum, the criteria set forth and approved below in this Financing Order; and (ii) comply with the billing, collection and remittance procedures and information access requirements set forth below.

28. The Board will only authorize a TPS to bill and collect the Transition Bond Charge or the MTC-Tax for remittance to the Servicer or the Petitioner respectively, if (i) such TPS agrees to remit the full amount of all charges it bills to customers for services provided by the Petitioner or any successor electric public utility, together with Transition Bond Charges and the MTC-Tax, regardless of whether payments are received from such customers, within 15 days of Petitioner's or the Servicer's bill for such charges, (ii) such TPS will provide the Servicer with total monthly kwh usage

information for each customer in a timely manner for the Servicer to fulfill its obligations, as such information is the basis of such remittance, and (iii) the Servicer will be entitled, within seven days after a default by the TPS in remitting any charges payable to the Petitioner, together with Transition Bond Charges and the MTC-Tax, to assume responsibility for billing all charges for services provided by Petitioner or any successor electric public utility, including the Transition Bond Charges and the MTC-Tax, or to transfer responsibility to a qualifying third party. In addition, if and so long as such TPS does not maintain at least a 'BBB' (or the equivalent) long term unsecured credit rating from Moody's Investors Service or Standard & Poor's Rating Services, such TPS shall maintain, with the Servicer or as directed by the Servicer, a cash deposit or comparable security equal to two months' maximum estimated collections of all charges payable to the Servicer, including the Transaction Bond Charges and the MTC-Tax, as reasonably estimated by Petitioner (or any such successor electric public utility or by the Servicer). In the event of a default in the remittance of any such charges by a TPS, any shortfall in Transition Bond Charge or MTC-Tax collections will be included in the periodic adjustment of the Transition Bond Charge and the MTC-Tax as described herein.

29. Customers will continue to be responsible for payment to the Servicer of the Transition Bond Charge and the MTC-Tax billed by a TPS, to the extent such customer has not paid Transition Bond Charges or MTC-Tax billed to it. In the event of a failure of any customer to pay the Transition Bond Charge or MTC-Tax, the Petitioner is authorized to shut-off power, or a successor Servicer is authorized to direct the electric public utility to shut-off power, to such customer in accordance with law.

30. The Servicer will be entitled to an annual servicing fee equal to .05% of the initial balance of the Transition Bonds (the "Servicing Fee"). The Board approves the Servicing Fee as described herein. The Board also approves a

higher annual Servicing Fee of any successor Servicer of up to 1.25% of the initial principal balance of the Transition Bonds.

The Transition Bond Charge: Establishment and Adjustment

31. The formula used to calculate the Transition Bond Charge and to periodically adjust the Transition Bond Charge, as described in Appendix I hereof, is approved.

32. Pursuant to Section 15 of the Act the initial Transition Bond Charge and MTC-Tax will be filed with the Secretary of the Board in the Issuance Advice Letter and will be effective upon such filing, to be adjusted up or down, as necessary, by the True-Up Mechanism.

33. In accordance with Section 15 of the Act, the Servicer, on behalf of Petitioner and the pledgees or transferees of the Bondable Transition Property, is authorized to file with the Secretary of the Board periodic formula-based Transition Bond Charge adjustments, at least annually but not more frequently than quarterly, to the extent necessary to ensure the full and timely recovery of an amount equal to the Periodic Payment Requirements. Each such adjustment shall be formula-based, shall be in the amount required to ensure receipt of revenues sufficient to provide for the full and timely recovery of Bondable Stranded Costs, including, without limitation, the timely payment of principal of, and interest and acquisition or redemption premium on, the Transition Bonds issued to finance such Bondable Stranded Costs. The periodic adjustments will be filed in substantially the form attached to this Financing Order as Appendix C.

34. Each periodic adjustment of the Transition Bond Charges will become effective 30 days after filing with the Secretary of the Board, absent a determination by the Board of manifest error (i.e., an arithmetic error evident on the face of the filing) in the application of the formula approved herein. Petitioner will propose such adjustments in a filing with the Secretary of the Board at least 30 days in advance of

the date upon which it is requested to be effective. The proposed adjustment will become effective on an interim basis on such date and, in the absence of a Board order to the contrary correcting such manifest error, will become final 60 days after the filing.

35. If necessary to ensure the timely recovery of the Periodic Payment Requirements and the MTC-Tax, the Board will approve adjustments to the methodology as proposed by Petitioner in "non-routine" true-up filings as discussed hereinabove.

Use Of Transition Bond Proceeds

36. Petitioner will use the proceeds of the Transition Bonds, net of transaction costs and any costs of credit enhancement for the Transition Bonds paid from the proceeds, to reduce its Bondable Stranded Costs through the retirement of Petitioner's debt or equity, or both (including transactions completed after the date of this Order.). Petitioner is authorized to apply the proceeds to retire debt, equity or both, substantially as set forth in Petitioner's Second Quarter 10-Q filed with the SEC, and to pay any accrued interest and accrued preferred dividends from the date of issuance of the Transition Bonds to the date of retirement, and to pay any premium, unamortized discounts and other fees, costs and charges associated with such retirement. No failure to apply the proceeds in accordance with the Restructuring Order or this Financing Order shall affect the sale of the Bondable Transition Property or the right to collect the Transition Bond Charges.

Approval of Servicing Agreement, Administration Agreement, Sale Agreement, Hedging Arrangement, if any, and Other Agreements and Transactions

37. Petitioner's entering into a servicing agreement, an administration agreement, a sale agreement, any hedging arrangement and other Transition Bond Transaction documents with the SPE consistent with the terms of this Order and/or substantially as described in the SEC Filing and

such other related transaction documents and other dealings between Petitioner and the SPE as contemplated therein and herein are authorized.

Accounting for Certain Benefits

38. Pursuant to Section 15 of the Act, any amount of the Transition Bond Charges held by the Bond Trustee in excess of those amounts necessary to fully recover the Periodic Payment Requirements will be applied as a credit to reduce Transition Bond Charges through the True-Up mechanism, as described in the Petition, except that if more than one issue of Transition Bonds is sold, all such requirements with respect to such Transition Bonds will be aggregated for purposes of determining whether or not the total transition bond charges collected exceed the total of such requirements for all such Transition Bonds.

39. Upon retirement of all outstanding Transition Bonds and any related Ongoing Transition Bond Costs, any remaining amounts held by the Bond Trustee will be released to the SPE. Petitioner's equity in the SPE may be distributed to Petitioner. Petitioner will credit an amount equal to any remaining Transition Bond Charges, less any amount of any unpaid MTC-Tax charges and any amount that was withdrawn and not replenished to the SPE's equity, to its electric customers against its distribution charges. Any overcollected MTC-Tax charges shall also be credited to Petitioner's electric customers against Petitioner's distribution charges.

40. Not more than nine months following issuance of the Transition Bonds, the Petitioner will file with the Board a reconciliation statement for Upfront Transaction Costs and Capital Reduction Costs. If the sum of Upfront Transaction Costs and Capital Reduction Costs exceeds $125 million, such excess shall be eligible for recovery in a subsequent proceeding. If the sum of Upfront Transaction Costs (plus any hedging costs associated with any hedging arrangements entered into prior to the pricing of Transition Bonds) and

Capital Reduction Costs is less than $125 million, such difference shall be credited against the Petitioner's Societal Benefits Charge to the benefit of ratepayers. Prior to being expended for their intended purpose, earnings on proceeds from the Transition Bonds issued to pay transaction costs (Capital Reduction and Upfront Transaction Costs (plus any hedging costs associated with any hedging arrangements entered into prior to the pricing of Transition Bonds)) shall be credited to the beginning balance of deferred costs associated with Petitioner's Societal Benefits Charge, and bear interest at the rate applicable to such balance as set forth in Ordering Paragraph 6 on page 116 of the Restructuring Order. The failure to file such statement or any delay in filing the same or making such credits shall not affect the validity of this Financing Order, the Bondable Transition Property or the Transition Bonds.

Records

41. Pursuant to Section 21 of the Act the Petitioner or another Servicer on its behalf Will maintain or cause to be maintained records of Transition Bond Charges and associated MTC-Tax collections which have been assessed and collected by Petitioner, as Servicer, under this Financing Order and the Restructuring Order respectively. Such records, and any records of a financing entity, will be made available by Petitioner for inspection and examination within a reasonable time upon demand therefor by the Board or the related financing entity.

MTC- Tax Adjustments

42. Pursuant to the Restructuring Order and this Order, Petitioner is authorized to file with the Board proposals for mandatory periodic adjustments of the MTC-Tax authorized by the Board in the Restructuring Order. Such adjustments shall be formula-based and shall initially be based on the formula attached hereto as Appendix I and is hereby approved. Such adjustments shall be made substantially in the same manner and at the same time as the True-Up

Mechanism for the Transition Bond Charges in order to insure receipt of revenues sufficient to recover the MTC-Tax Component. Unless the Petitioner or the Board proposes an adjustment to the formula used to calculate the MTC-Tax, any proposed adjustment to the MTC-Tax will become effective 30 days after filing absent manifest error and, in the absence of a Board Order to the contrary, will become final 60 days after filing. The initial amount of the MTC-Tax will be filed with the Board as part of the Issuance Advice Letter and become effective upon such filing in the same manner and at the same time as the related initial Transition Bond Charge. The periodic adjustments will be filed in substantially the form attached to this Financing Order as Appendix C.

43. It is the express intention of the Board that the Petitioner shall not overrecover or underrecover the MTC-Tax Component. Accordingly, Petitioner shall adjust the formula used to calculate the MTC-Tax to reflect changes in federal income tax or State corporate business tax rates and any other changes to the application or interpretation of such laws, provided such changes are either "generic" (affect all taxpayers such as a prospective change in the tax rate) or are securitization-related. The latter changes would, for example, include the amortization of Investment Tax Credits, as described on pages 112, 113 and 125 of the Restructuring Order, or the deductibility of the amounts received for overcollateralization in the event that such payments are prospectively determined by the IRS to not constitute taxable income as a result of an IRS letter or other ruling to that effect.

Any proposed adjustment to the formula by the Petitioner shall be submitted to the Secretary of the Board no less than 60 days prior to its proposed effective date and shall become effective on the proposed effective date absent a Board Order to the contrary; provided, however, that the existing formula shall remain effective in the interim.

44. As provided in Section 23(a)(4) of the Act, Petitioner's right to recover the MTC-Tax Component will in

no way affect or impair the legal true sale and absolute transfer of the Bondable Transition Property to the SPE, or otherwise affect the legal rights and attributes of the Bondable Transition Property under the Act or under this Financing Order.

Miscellaneous

45. Pursuant to Section 19 of the Act this Financing Order will be effective only in accordance with the terms hereof and upon the written consent of Petitioner to all such terms.

46. In pricing the Transition Bonds, and in determining whether it may be advantageous to enter into a hedging arrangement prior to the pricing of the Transition Bonds pursuant to Section 2(e), Petitioner will apply both the methodology on which Appendix H is based (securitizing Transaction Costs as approved herein pre-tax and reflecting the related tax deductions in the initial-year of the MTC-Tax calculation) and that on which Appendix I is based (securitizing Transaction Costs as approved herein on a net-of-tax basis and not reflecting the tax-related tax deductions in the initial year of the MTC-Tax calculation), and base the pricing and hedging determination on the method that results in the lowest total Transition Bond and MTC-Tax Charges, calculated as shown in Attachment A-I of either Appendix H or I.

47. Pursuant to Section 25 of the Act, the consideration or approval by the Board of a petition by Petitioner under the Act, including this Financing Order and the periodic adjustment provided in Section 15 of the Act, will be wholly separate from, and will not be utilized in the Board's consideration of, any other ratemaking or other proceeding involving Petitioner, except as otherwise provided in Sections 39 and 40 hereof and in the Act.

This Financing Order is issued subject to the following provisions, failure of compliance with which shall not affect the rights of the holders of the Transition Bonds:

(1) Petitioner will furnish the Secretary of the Board with copies of all documents as executed and filed with other regulatory agencies relating to the Transition Bonds.

(2) Petitioner will quarterly file with this Board a statement setting forth details with respect to the disbursement of net proceeds of the Transition Bonds and their use in retiring debt or equity or both.

(3) This Financing Order will not be construed as a certification that the Transition Bonds will be secured by tangible or intangible assets of commensurate value or investment costs.

(4) The Petitioner is directed to file, as part of its required Unbundling Filing of August 1, 2002, data showing the impact of the timing of customer payments of transition bond charges to Petitioner versus payments by Petitioner, as Servicer, to the transition bond trustee. This data shall include a calculation of customer daily remittances, timing of remittances to the bond trustee and the short-term interest rate then applicable to determine the amount of "float" income earned by Petitioner in its capacity as Servicer. If the Board determines in its review of this filing, that Petitioner retained revenue over and above its servicing fee, it may calculate such retained revenue, and impute interest thereon, in determining fair and reasonable rates going forward from the date of its review.

(5) The Board hereby designates Herbert H. Tate, President, or in his absence any other Commissioner, as its Designee under this Financing Order. Such Designee shall act only in accordance with the Designee Guidelines approved herein and attached hereto as Appendix E.

DATED: September 17, 1999

BOARD OF PUBLIC UTILITIES
BY:

/s/_____
HERBERT H. TATE
PRESIDENT

_____
CARMEN J. ARMENTI
COMMISSIONER

/s/_____
FREDERICK F. BUTLER
COMMISSIONER

ATTEST: /s/_____
MARK W. MUSSER
SECRETARY

CONSENT OF PETITIONER

Pursuant to Section 19 of the Act, Petitioner hereby consents to all of the terms of this Bondable Stranded Consent Order, this 17th day of September, 1999.

PUBLIC SERVICE ELECTRIC
AND GAS COMPANY
BY:

/s/_____
ALFRED C. KOEPPE
SENIOR VICE PRESIDENT

(3)

Supreme Court, U.S.
FILED

No. 001393 MAR - 6 2001

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

October Term, 2000

CO-STEEL RARITAN

Petitioner,

v.

NEW JERSEY BOARD OF PUBLIC UTILITIES

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of the State of New Jersey

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI VOLUME II

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Agenda Date: 4/21/99

STATE OF NEW JERSEY
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

ENERGY

IN THE MATTER OF PUBLIC SERVICE ELECTRIC AND GAS COMPANY'S RATE UNBUNDLING, STRANDED COSTS AND RESTRUCTURING FILINGS	) FINAL DECISION AND) ORDER)) BPU DOCKET NOS.) EO97070461,) EO97070462, AND) EO97070463

(SERVICE LIST ATTACHED)

BY THE BOARD:

This Decision and Order memorializes and provides the reasoning for the action taken by the Board of Public Utilities ("Board" or "BPU") in these matters, by a vote of three Commissioners, at its April 21, 1999 public agenda meeting, which action was summarized in our Summary Order dated April 21, 1999. The structure of this Decision and Order is set forth in the following Table of Contents.

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I. BACKGROUND AND PROCEDURAL HISTORY

The New Jersey Energy Master Plan Phase I Report ("Phase I Report"), released in March 1995, presented a vision for the State in which energy markets in New Jersey would be guided by market-based principles and competition. The Phase I Report recognized that increased competition in New Jersey's energy markets could potentially help reduce the high energy prices existing in the State, further the State's economic development goals, and provide an opportunity to streamline the regulatory review process. The Phase I Report provided a policy framework for the transition from energy industry monopolies to competitive markets.

The Phase I Report also made several policy recommendations to be implemented as short term or interim measures to address immediate competitive pressures in the State and to prepare for the transition to competition. These included the adoption of legislation allowing rate flexibility and permitting alternative regulation to enable New Jersey's electric utilities to compete to retain certain "at risk" customers and attract new customers, while stimulating efficiency and innovation. The Phase I Report further recommended the adoption of significant consumer protection standards to ensure that captive ratepayers do not subsidize competitive activities and that all ratepayers benefit from the transition to more competition. In addition to the recommendations for interim action, the Phase I Report also explicitly directed the BPU to investigate possible changes to the structure of the electric power industry in New Jersey as a longer term means of achieving lower costs of electricity in the State.

In response to the identified need for interim measures, the Rate Flex and Alternative Regulation Act, N.J.S.A. 48:2-21.24 et seq. (the "Rate Flex Act"), was enacted in July 1995. In this Act, the Legislature found that during a transitional phase aimed at achieving the long term goal of lower electric

and natural gas costs to consumers, it might be necessary for the BPU to implement short-term measures to promote and enhance economic development and employment in the State, and to permit New Jersey utilities to compete for customers with competitive alternatives. The Rate Flex Act specifically allows the State's electric utilities to enter into off-tariff rate agreements with customers for a period of seven years from the Act's passage and permits electric or gas utilities to petition the BPU to be regulated under alternatives to rate base/rate of return regulation.

The Rate Flex Act further declared that it is the policy of the State to foster the production and delivery of electricity and natural gas in a manner that lowers costs and rates while improving the quality and choices of service for all energy consumers; to ensure that New Jersey remains economically competitive on a regional, national and international basis; and to enhance the economic vitality of the State by attracting and retaining business and creating and retaining jobs. The Legislature also found that competitive market forces can produce the stated goals of improved quality and choices of energy services at lower costs, while promoting efficiency, reducing regulatory delay and fostering productivity and innovation.

Consistent with the Phase I Report, and in keeping with the Legislature's stated desire that increased competition in energy markets be explored as a more long-term means to reduce the cost of electricity in New Jersey for all customers, the BPU, by Order dated June 1, 1995, initiated a Phase II proceeding under Docket No. EX94120585. This proceeding was intended to accomplish several goals. By investigating the long term structure of the electric power industry in the State, it was hoped that an electric power industry policy could be developed to facilitate the emergence of a competitive marketplace which would foster the production and delivery of electricity in such a matter as to lower costs and rates and improve the quality and choices of service. In those areas where effective competition developed, ongoing

regulation in its present form might be unnecessary. Additionally, there was the goal of facilitating the development of competition in those markets where competitive services did not yet exist, but where increased competition could benefit consumers. Finally, there was a concern about the need to continue to regulate the quality and price of energy supplies and services where competition does not exist and it is determined that consumers are best served by continued regulation.

Thus, a proceeding was initiated by the Board to investigate the appropriateness and feasibility of electricity wheeling or electric power competition at the retail level; the actions necessary to establish a fully efficient, competitive wholesale marketplace for electric generation; whether divestiture of electric utility generation assets is necessary; the need for retail wheeling if an efficient, competitive wholesale electric power market is achieved; the need for divestiture of electric utility generation assets or alternatively, the unbundling and corporate separation of electric services; and the definition and equitable treatment of stranded investments. Consistent with State policy goals expressed in the Rate Flex Act, the Board specifically directed that the proceeding investigate the appropriate manner of continuing existing consumer and environmental protections in a restructured market; ensuring universal, non-discriminatory access to service; guaranteeing the provision of a safe and adequate power supply and system reliability; and achieving the State's environmental and energy efficiency goals.

The Board sought to obtain guidance and input on the many issues raised from the widest possible array of interests. The BPU solicited and received several rounds of written comments as well as written testimony, conducted public and legislative-type hearings and, through its Staff, formed and facilitated informal working groups and a negotiating team to explore issues in more depth and to attempt to develop a consensus, where possible.

On January 16, 1997, the BPU released its Proposed Findings and Recommendations in the Phase II Proceeding ("Draft Report"). The Board held a public hearing to receive oral comments on the recommendations contained in the Draft Report at the Board's Newark offices on February 4, 1997. Additional public hearings were held in Blackwood, New Jersey on February 5, 1997 and in Trenton on February 11, 1997. The Board received written comments from 39 parties and heard testimony from 42 parties relative to the Draft Report.

On April 30, 1997, after careful consideration of the input received regarding its Draft Report, the Board issued an Order Adopting and Releasing Final Report. The Final Report, entitled "Restructuring the Electric Power Industry in New Jersey: Findings and Recommendations" ("Final Report"), was submitted to the Governor and the Legislature for their consideration and contained the BPU's findings and recommendations concerning the future structure of the electric power industry in New Jersey, including the recommendation to offer electric consumers a choice of electric power suppliers, beginning in October 1998, to effectuate substantial economic benefit, in the form of lower electric bills and more service options to the State's residents and businesses. In the introductory letter presenting the Final Report to the Legislature, Governor and residents and business owners of the State, the Board expressly stated that it looked forward to working with the Legislature and the public over the coming months to develop legislation necessary to adopt appropriate consumer protection measures and to implement these policy findings and recommendations.

Recognizing that there were a number of substantial procedural steps necessary to implement the recommended policies, and in order to prepare for the commencement of retail competition, the Board, in its April 30, 1997 Order, directed each of the State's four investor owned electric utilities, Atlantic Electric Company ("ACE"), Jersey Central Power and Light Company, d/b/a GPU Energy ("GPU"),

Public Service Electric and Gas Company ("PSE&G" or "Company") and Rockland Electric Company ("RECO") to make three filings by July 15, 1997. These included a rate unbundling petition, a stranded cost petition, and a restructuring plan. The Board also recognized that there were a number of issues which needed to be addressed generically for all four electric utilities, including standards for fair competition, affiliate relationship standards, analysis of market power, and the mechanics for the phase-in of customer choice. The Board anticipated that these issues would be pulled out of the individual utility proceedings and reviewed generically.

By Order dated June 25, 1997, the Board directed its Division in Audits, in cooperation with the Division of Energy, to initiate management audits on ACE, GPU, PSE&G and RECO in accordance with N.J.S.A. 48:2-16.4 , and to solicit the assistance of qualified consulting firms to perform said audits under the supervision of Board Staff. Said audits were to include, but not be limited to, focused reviews of the individual electric utilities' unbundling, stranded costs and restructuring filings. A Request for Proposals was issued on June 27, 1997, and after receipt and review of numerous proposals, Vantage/ICF Consulting ("ICF" or "the Auditors") was selected by the Board to perform the audit of PSE&G, under BPU Docket No. EA7060397.

On July 11, 1997, the Board issued an Order Establishing Procedures, wherein it determined to transmit each utility's rate unbundling and stranded cost filing to the Office of Administrative Law ("OAL") for hearings and Initial Decision, and to retain the restructuring plan filings for its review and, as necessary, hearings, with the intention of issuing a Final Decision and Order in these matters before the anticipated start date of competition.

On July 15, 1997, Public Service Electric & Gas Company filed its Proposal in Response to the Final Report.[1] The Company's proposal was supported by the prefiled direct testimony of Lawrence R. Codey, Frederick W. Lark, Robert C. Murray, Gerald W. Schirra, Robert C. Krueger, Dr Colin J. Loxley, and Paul I. Joskow.

The unbundling and stranded costs portions of PSE&G's filing were transmitted to the OAL, and assigned to Administrative Law Judge ("ALJ") Louis G. McAfoos t/a. The restructuring portion of the filing was retained by the Board.

On September 15, 1997, the Board issued an Order on Motions to Intervene/Participate and for Pro Hac Vice Admission, wherein it considered and ruled upon numerous motions for intervention and/or participation and pro hac vice admission in the restructuring proceedings retained by the Board. Motions to intervene in the PSE&G unbundling and stranded cost proceedings were ruled upon by ALJ McAfoos.[2]

On September 19, 1997, the Board issued an Order in response to a letter motion filed by the Division of the

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[1] Unlike the other three utilities, and contrary to the Board's directive in its April 30, 1997 Order, PSE&G did not make three separate filings, but made a single filing containing its unbundling, stranded costs and restructuring proposals. The filing was assigned three separate BPU Docket Nos. EO97070461, EO97070462, and EO97070463, for the respective unbundling, stranded costs and restructuring issues.

[2] In addition to PSE&G, Staff and the Division of the Ratepayer Advocate, the following parties were granted intervenor status by ALJ McAfoos: Atlantic City Electric Company; Co-Steel Raritan ("Co-Steel"); Coalition For Fair Competition ("CFC"); Cogen Technologies Energy Group ("Cogen"); County of Passaic; Duke Energy Trading and Marketing, L.L.C. ("Duke"); Electric Clearinghouse, Inc. Additionally, participant status, pursuant to N.J.A.C. 1:1-16.5, was granted to Citizens Against Rate Escalation ("C.A.R.E."); New Jersey Citizen Action ("NJCA"); Allen Goldberg; New Jersey Natural Gas Company ("NJNG"); and South Jersey Gas Company ("SJG"). MidCon/mc2 withdrew from these cases in June 1998.

Ratepayer Advocate ("RPA"), wherein, among other things, the Board provided certain clarifications and guidance as to the scope of the proceedings before the OAL, offered further guidance on the issues of securitization, the level of rate reductions and divestiture, and extended, by one month, the date by which Initial Decisions were to be rendered by the OAL.

By Order dated September 25, 1997, the Board established procedures for the restructuring proceedings retained by the Board, and identified issues that would be specifically considered. The Board Order identified certain issues which it anticipated were likely to be contested, as well as issues with generic implications which might lend themselves to a collaborative review. For the generic issues, the Board created three working groups on customer processes, reliability and competitive issues, to discuss specific details, narrow issues in contention and attempt to develop a consensus position, if possible. The working groups were directed to provide status reports to the Board by January 10, 1998, identifying areas of consensus, as well as areas where consensus was unlikely. The Board recognized that where consensus was unlikely, a further procedural schedule would need to be established.

Additional Orders in the above-captioned dockets were issued by the Board between October 1997 and March 1999, addressing additional motions by various parties, including motions for intervention, pro hac vice admission, schedule modifications, clarification and reconsideration of earlier rulings, and interlocutory review of certain ALJ rulings. Additionally, by Order dated January 28, 1998, the Board established a procedural schedule for review of the following generic restructuring issues: the potential for exercise of market power by the State's electric utilities regarding their generation assets; functional separation plans; divestiture of generation assets; basic generation plans, including the cost to provide service to low-income and bad-debt customers; mechanics of the phase-in of retail competition; the customer

enrollment process; load balancing and a settlement system requirements for alternative supplier deliveries; and Demand Side Management ("DSM") and renewables issues. The Board noted that PSE&G's proposal to introduce retail choice initially on an energy-only basis, an issue specific to PSE&G, could also be the subject of testimony. The Board also noted that there might be a need for hearings in the proceedings before it on any individual issues left unresolved in the unbundling and stranded cost proceedings.

ALJ McAfoos issued a Procedural Order Setting Schedule for the proceedings at the OAL on October 8, 1997, which was modified on November 10, 1997 to allow additional time for parties to submit prefiled testimony.

On or about November 26, 1997, testimony was filed in the unbundling and stranded cost proceedings by the following witnesses on behalf of the intervenors: Raymond E. Makul on behalf of the CFC; Jeffrey A. Brown, Harry J. Kingerski and Theodore F. Kuhn on behalf of Enron; Steven Gabel on behalf of IEPNJ; Steven Gabel on behalf of MAPSA; David Magnus Boonin and Nancy I. Day on behalf of NEV; Dr. Alan Rosenberg on behalf of NJBUS and NJICG; John L. Parodi, Henry Riewerts and James B. Rouse on behalf of NJBUS; Dr. Dennis W. Goins on behalf of NJCU; William B. Marcus and Edward A. Smeloff on behalf of NJPII[3]; Cheryl Beach on behalf of NJT; Charles Wolfe on behalf of IBEW Local 94; Peter A. Bradford, Michael D. Dirmeier, Robert J. Henkes, Dr. Richard A Rosen, Douglas C. Smith and John K Stutz on behalf of the Ratepayer Advocate;

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[3] The Natural Resources Defense Council ("NRDC"), a member of the NJPII coalition, did not join in the submission by NJPII of testimony, briefs and/or exceptions in the stranded costs, unbundling and restructuring proceedings.

and Elliot M. Loyless and Herman L. Seedorf on behalf of Tosco.[4]

The Company filed rebuttal testimony by: Lawrence R. Codey, Dr. Paul L. Joskow, Robert C. Krueger, Frederick W. Lark, Dr. Colin J. Loxley, Robert W. Metcalfe, Robert C. Murray, David R. Powell, Gerald W. Schirra and Albert N. Stellwag.

ALJ McAfoos conducted a status conference on January 16, 1998 and issued a hearing schedule for the unbundling and stranded costs proceedings on January 24, 1998.

On or about January 26, 1998, surrebuttal testimony was filed by the following witnesses on behalf of the intervenors: Vincent C. Dimiceli and Scott Norwood on behalf of Co-Steel Raritan; Harry J. Kingerski and Theodore F. Kuhn on behalf of Enron; Dr. Alan Rosenberg on behalf of NJBUS and NJICG; Peter A. Bradford, Michael D. Dirmeier, Robert 1. Henkes, Dr. Richard A. Rosen, James A. Rothschild, Douglas C. Smith and John K Stutz on behalf of the Ratepayer Advocate; William B. Marcus on behalf of NJPII; Dr. Dennis A. Goins on behalf of NJCU; Steven Gabel on behalf of MAPSA; and Raymond E. Makul on behalf of the CFC. Tosco also filed and served revised prefiled testimony of witnesses Loyless and Seedorf to conform with a December 23, 1997 ruling by the ALJ concerning the striking of certain portions of their prefiled testimony.

On January 29, 1998, the Board accepted as received and released to all parties in the unbundling and stranded cost proceedings, copies of the Management Audit Report entitled "Audit of Public Service Electric and Gas Unbundling and Stranded Cost Filings of its Electric Restructuring Docket No.

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[4] As outlined in the Procedural History attached to the Initial Decision, a number of motions to strike portions of the various testimonies were filed by the Company and ruled upon by the ALJ. Some of these rulings were followed by motions to the Board for interlocutory review, which were in turn, considered by the Board.

EX97060397" which was prepared for the Board by Vantage/ICF Consulting. On March 5, 1998, the Board accepted as received and released to all parties in the restructuring proceeding, copies of the Management Audit Report regarding PSE&G's restructuring filing prepared by ICF.

Twenty days of evidentiary hearings were conducted at the OAL between February 9, 1998 and March 18, 1998 on the unbundling and stranded costs proceedings. During that time period, witnesses were cross-examined on their prefiled direct testimony, as well as on any filed rebuttal or surrebuttal testimony. At the close of hearings, a briefing schedule and issues outline were adopted by ALJ McAfoos. After requesting and receiving extensions of time from the Board, Initial Briefs were filed on or about April 13, 1998. Reply Briefs were filed on or about April 20, 1998.

After the PSE&G unbundling and stranded cost hearings and briefing were completed at the OAL, approximately twenty additional days of evidentiary hearings were held before Commissioner Carmen J. Armenti between April 27, 1998 and May 28, 1998, for testimony and cross-examination by the parties on certain identified restructuring issues affecting all four electric utilities which had been retained by the Board.

Direct and/or rebuttal or surrebuttal testimony was filed by Atlantic Electric Company (Joseph R. Bartalone, Jr., Tsion M. Messick, Thomas S. Shaw, Jerrold L. Jacobs, Henry K. Levary, Eileen Unger, Ashley C. Brown, Rodney Frame, Paul L. Joskow); the CFC (Raymond E. Makul); GPU (Dennis Baldissari, Douglas J. Howe, Charles A. Mascari, William Hogan, Almarin Phillips); IBEW Local 94 (Charles Wolfe); IEPNJ (Steven Gabel); MAPSA (Steven Gabel, Dr. Craig Roach); NEV (Barbara Kates Garnick); NJBUS (Henry Riewerts, John Parodi); NJICG (Fred Mazurski); NJPII (not including the NRDC) (Nathaniel Greene, Bruce Biewald, Edward Smeloff, Thomas Bourgeois); NorAm (Keith Sappenfield); PSE&G (Gerald W. Schirra, Frederick W. Lark,

Colin Loxley, Lawrence R. Codey, Alfred E. Kahn, Rodney Frame, Paul Jaskow); the Ratepayer Advocate (Barbara Alexander, Peter Lanzalotta, Andrea Crane, Peter A. Bradford, Roger Colton, James D. Cotton, Dr. David A. Nichols); RECO (Terry L. Dittrich, Frank P. Marino, John C. Dalton, John Lombardi); and SESCO (Richard Esteves). In addition, representatives of the four consulting firms (ICF, Stone and Webster, Barrington-Wellsley and Hagler Bailley) which submitted Management Audit Reports to the Board on the four electric utilities' restructuring filings also testified and were cross-examined.

During the hearings, various motions, including motions to strike certain portions of the prefiled testimony were ruled upon by Commissioner Armenti, whose rulings are **HEREBY AFFIRMED** by the entire Board, essentially for the reasons set forth by Commissioner Armenti in the transcripts.

After the close of hearings before Commissioner Armenti, briefs and reply briefs on the restructuring issues were filed on June 26 and July 17, 1998, respectively. This Order also incorporates, as they apply to PSE&G, four of the issues considered in the restructuring proceeding before the Board: market power, basic generation, divestiture and the proposal of PSE&G to initially introduce retail choice on an "energy-only" basis.

After requesting and receiving an extension of time from the Board, ALJ McAfoos issued an Initial Decision and Report on PSE&G's unbundling and stranded cost filings on August 14, 1998. The parties filed Exceptions and Replies to Exceptions to the Initial Decision with the Board on October 2 and October 30, 1998, respectively.

On February 9, 1999, Governor Whitman signed into law the Electric Deregulation and Energy Competition Act ("the Act"), N.J.S.A. 48:3-49 et seq. The Act authorizes the Board to permit competition in the electric generation and natural gas supply marketplace and such other traditional utility areas as the Board determines. In addition, all four electric utilities

were mandated to implement specific rate reductions over the course of the next four years.[5] Among other things, the Act requires that the Board, by Order, shall provide that by no later than August 1, 1999, each electric public utility shall provide retail choice of electric power suppliers for its customers, reduce its aggregate level of rates for each customer class by no less than five percent, unbundle its rate schedules and establish so called "shopping credits" applicable to the bills of retail customers who choose alternative electric power suppliers.

By letter dated March 8, 1999, MAPSA moved to reopen and supplement the record in the PSE&G unbundling and stranded cost proceedings to update the record on stranded costs and to consider the appropriate level of the shopping credit which the Board is required to establish under the Act. By Order dated March 25, 1999, the Board denied MAPSA's motion.

By Order dated February 11, 1999, the Board established guidelines and a schedule for the commencement of settlement negotiations among the parties in the PSE&G stranded costs, unbundling and restructuring proceedings. The Board set a deadline of March 3, 1999, for the submission to the Board of a negotiated settlement, which deadline was later extended to March 5, 1999. No comprehensive settlement was reached among all the parties; however, on March 17, 1999, a proposed stipulation of settlement ("Stipulation") was filed by PSE&G, NRDC, NJCU, IBEW Local 94, NJT, Enron, Tosco and IEPNJ. A proposed alternative stipulation of settlement ("Stipulation II") was submitted to the Board on March 29, 1999, by the Division of the Ratepayer Advocate, MAPSA, NJBUS, NJICG, NJPII (with the exception of NRDC), and NEV. Parties were provided the opportunity to submit comments to

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[5] Although the natural gas market will be opened to competition, as will the provision of other energy related services, no specific statewide rate reductions were mandated for the four natural gas utilities.

the Board on the Stipulation by April 5, 1999 and on Stipulation II by April 7, 1999.

By Order dated July 13, 1998, the Board ruled on various motions or objections, including a motion dated April 22, 1998 by the CFC for the Board to disclose any ex parte communications in accordance with N.J.A.C. 1:1-14.5(a). N.J.A.C. 1:1-14.5(a) is a part of the Uniform Administrative Procedure Rules, which were adopted by the Office of Administrative Law and pertain to contested case proceedings. This regulation provides:

> Except as specifically permitted by law or this chapter, a judge may not initiate or consider ex parte any evidence or communications concerning issues of fact or law in a pending or impending proceeding. Where ex parte communications are unavoidable, the judge shall advise all parties of the communications as soon as possible thereafter.

In response to the CFC's April 1998 motion, the Board ruled that "to the extent there are communications on issues of fact or law being adjudicated in the unbundled rates and stranded cost filings, as opposed to policy and legal issues being considered in the generic, legislative type proceeding, the Board would be required to comply with N.J.A.C. 1:1-14.5(a). Therefore, the Board does not grant or deny the CFC's motion itself because the Board is required, in any event, to comply with applicable law."

By a subsequent motion dated February 22, 1999, the CFC again moved pursuant to N.J.A.C. 1:1-14.5(a), for disclosure of ex parte communications. No responses or other filings were made with regard to the CFC's motion. At its agenda meeting of April 21, 1999, the Board confirmed that there had not been ex parte communications on issues of fact or law to be adjudicated by the Board in PSE&G's unbundled rates and stranded cost proceedings. Accordingly, there are no disclosures to be made pursuant to N.J.A.C. 1:1-14.5(a)

and the Board's ruling on the CFC's prior motion, and the Board determined to dismiss the CFC's motion as it pertained to the PSE&G proceedings.

On April 20, 1999, on the eve of the Board's scheduled consideration of this matter at its April 21, 1999 public agenda meeting, the CFC requested oral argument with respect to the pending proposed stipulations, arguing that there has been no opportunity for public dialogue between the Board and the parties on the issues raised by the stipulations. PSE&G opposed the request for oral argument. At our April 21, 1999 public agenda meeting, we determined to deny the motion for oral argument. We note that oral argument is discretionary with the Board and we are satisfied that the CFC and all parties have had extensive opportunities to raise their concerns through evidentiary hearings, briefing, the stipulation process and in written comments with respect to the pending stipulations.

II. INITIAL DECISION

On August 14, 1998, ALJ McAfoos filed his Initial Decision with the Board. The I.D. contains a procedural history and a summary of PSE&G's July 15, 1997 filing, a summary and analysis of the record, and provides the ALJ's findings with respect to the numerous litigated issues in the rate unbundling and stranded costs proceedings. Key elements of the Initial Decision are summarized below.

A. Stranded Costs

1. PSE&G's Estimate of Stranded Costs and Proposed Recovery

The Company's filing identifies the following major stranded cost components and amounts: nuclear generation, $3,119,023,000, and fossil generation, $787,008,000, for a total of $3,906,031,000. In addition, the Company has identified $1,589,030,000 of Non-Utility Generation ("NUG") contracts for stranded cost recovery. At page 9 of the I.D., the ALJ finds that the Company's broad characterization of

nuclear and fossil generation stranded costs and above market NUG contract costs "are reasonable categories to be included in the final computation of a stranded costs number." The ALJ makes no findings with respect to the issue of revenue loss to on-site generation and a competition transition charge, finding that the Board has reserved these issues unto itself in a separate docket. I.D. at 10. Additionally, the ALJ makes no findings regarding the existence of a regulatory compact with respect to capital expenditure recovery. Id.

2. Post-1992 Rate Case Capital Additions to Owned Generation

The Company's filing requested stranded cost recovery for capital additions made since its last base rate case was decided in 1992, including approximately $471 million in nuclear and $962 million in fossil capital expenditures during the period January 1, 1993 through December 31, 1998. An issue addressed at length in the record and in the I.D. at pages 10 through 15 is whether the Board's "market test" policies apply to several major capital addition projects, including the Bergen Phase I repowering, the Linden Generating Station combustion turbine project, and the Salem I steam generator replacement.

Relying on a number of past Board decisions, PSE&G argued that it was not required to perform an up-front economic analysis for these projects and that it has submitted substantial proofs to validate the prudency of these additions. The Ratepayer Advocate, Enron and other intervenors argued that PSE&G failed to meet its burden of proof, as set forth at page 106 of the Final Report, regarding these capital additions, in that it has not provided proof that a market test was undertaken to demonstrate the economics of these expenditures.

As a preliminary matter, the ALJ finds that previous Board Orders cited by PSE&G were only intended to relieve the Company of the need for an up-front economic review and prior Board approval before commencing these capital

projects, and do not relieve PSE&G of any duty to present persuasive testimony that a market test was performed to justify the economics of these projects and that the economics were validated. Nonetheless, the ALJ concludes that the Company has submitted substantial justification for the inclusion for the bulk of its post-1992 capital additions, as summarized below, and that the Board should recognize their inclusion for stranded cost calculation purposes. I.D. at 15.

a. Bergen I Repowering

PSE&G requested stranded cost recovery of approximately $126 million associated with the Bergen I facility repowering, out of a total repowering cost of approximately $400 million. Based upon his assessment of the record as set forth on pages 15 to 18 of the I.D., the ALJ concludes that "the moneys expended by the Company in the Bergen repowering were reasonable, and that the economic and environmental benefits the Company has demonstrated on the record were such that not only the prudency of the project was proven, but sufficient economic data can be found in the record to justify an *ex post facto* market test as to the reasonableness of this expenditure." I.D. at 18. The ALJ concludes, therefore, that the stranded costs associated with Bergen should be recognized by the Board. Id.

b. Linden Combustion Turbine Project

PSE&G requested stranded cost recovery of approximately $53 million for the Linden facility. The ALJ concludes that the Company provided sufficient data to satisfy a market test requirement and that the costs should be included in the stranded cost calculation. I.D. at 18.

c. Mercer Rehabilitation Project

PSE&G identified three major projects at the Mercer Generating Station, totaling approximately $140 million. The ALJ concludes that the expenditures on the Mercer facility were reasonably incurred and should be recognized by the Board in its stranded cost calculation. I.D. at 19.

d. Other Fossil Capital Addition Project Disallowances

The Auditors recommended that two fossil projects be disallowed from inclusion in the stranded cost calculation, namely, $1.977 million associated with the Burlington auxiliary power system replacement and $0.222 million associated with the Mercer CEM data acquisition system. PSE&G argued that these projects were mandated by state or federal environmental regulations. The ALJ concludes that these expenditures were reasonable and should be included in the stranded cost calculation. Id.

e. Salem Nuclear Capital Additions

The Company requested recovery of approximately $308 million of Salem Nuclear Generating station capital expenditures incurred since the 1992 base rate case, including $73 million for the replacement of a steam generator at Salem 1. The Ratepayer Advocate and a number of intervenors objected to the inclusion of these expenses. Based upon an assessment of the record as set forth at pages 19-21 of the I.D., the ALJ concludes that a sufficient quantum of evidence exists on the record for the Board to include $73.19 million associated with the steam generator replacement and $118.493 million associated with pre-steam generator projects in the stranded cost calculation. I.D. at 21.

3. Applicable Test/Methodology

In its filing, PSE&G made no provision for the divestiture of existing generating facilities. Several parties recommended divestiture as the most appropriate gauge of the actual market value of the facilities in the review of stranded costs. The ALJ notes that the Board had specifically reserved unto itself the issue of whether it would be appropriate to direct the electric utilities to divest themselves of their generating facilities and he therefore does not make any rulings on this question. I.D. at 22.

The ALJ notes that absent divestiture, an administrative determination must be made to arrive at a quantification of

stranded costs. He further notes that the Company's methodology, which was broadly followed by all intervenors in their studies, is premised on the theory that market value can be estimated administratively by utilizing a market price forecast. The forecasted market energy price and capacity price (otherwise referred to as the market clearing price or "MCP"), applied to the forecasted output of particular generating assets, was used to derive a projected market revenue of each facility on an annual basis. Forecasted annual cash expenditures including fuel, operation and maintenance ("O&M") expenses, capital additions, taxes, administrative and general ("A&G") expenses and other ancillary costs were then subtracted from the projected annual market revenues. A comparable analysis was performed for each generating facility, as well as for each power purchase agreement with NUG generators. The net results were discounted back to present value using a 8.42 percent discount rate, based upon the Company's 1992 cost of capital, using the Company's capital structure provided in the last base rate case. This net present value cash flow for each generating facility was subtracted from the net book value of each generating asset to derive the stranded cost. Using this methodology, PSE&G identified approximately $3.9 billion, net of tax, generation-related stranded costs.

As summarized in detail in the I.D. at pages 22 through 40, numerous parties challenged various aspects of the Company's quantifications, and the Ratepayer Advocate, Enron and the Auditors each performed independent studies, using a similar methodology, but with varying assumptions and inputs. The RPA recommended a net of tax generation related stranded cost level of $1.898 billion. Enron recommended that fossil generation stranded costs be reduced to $47 million and that nuclear generation stranded costs be reduced to $2.335 billion, producing a total recommended net of tax generation related stranded cost of approximately $2.4 billion. The final estimate provided by the Auditors was $2.852 billion. (Exhibit S-15).

Based on his review of the record, the ALJ recommends that certain adjustments be made to the Company's quantification of stranded costs. I.D. at 40-43. With respect to the forecast MCP, the ALJ was not persuaded by the RPA's and Auditors' calculations and methodologies concerning the cost and performance of new generating plants, concluding that they inappropriately failed to credit demonstrated savings associated with technological improvements. At the same time, he concludes that the Company's assumptions were overstated. He concludes that the RPA's quantification of future output from the Bergen and Mercer facilities is appropriate, notwithstanding that his calculations assume a much higher-than-average future capacity, since the Company's substantial recent investment in these facilities makes it reasonable to assume that the facilities will be in a position to operate more efficiently in the future than they have over the past five years. I.D. at 40. The ALJ also finds the RPA's quantification of the cost of fuel and resulting dispatch rates and its position regarding PJM imports to be persuasive. Id.

With regard to projected capacity prices, the ALJ concludes that the RPA and the Auditors each overstated escalation factors, resulting in inappropriately high capacity costs; on the other hand, he concludes that PSE&G's capacity escalation factor is understated, notwithstanding technological improvements. He also concludes that the $7.50 capacity price recommended by Enron is insupportable. Accordingly, he recommends that the Board calculate capacity prices by escalating at the anticipated general inflation rate during the forecast period. I.D. at 41. The ALJ concurs with the RPA's contention that the PJM market is moving from a cost-based to a market-based rate, and recommends adoption of the RPA's dispatching modeling proposal. He also concurs with the NJPII's adjustment to reflect nitrogen oxide and sulfur dioxide emission credits. Id.

Regarding future capital additions included in the stranded cost projection, the ALJ asserts that it reasonable to

assume that some level of ongoing capital additions beyond normal O&M expenses will be needed to maintain the facilities in safe operational condition; however, he recommends that PSE&G's estimates, while facially reasonable, should be subject to ongoing review. Additionally, the ALJ agrees with Staff that the anticipated replacement of the steam generator at Salem should be removed from the calculation. He also concurs with Enron's position to reflect cost values associated with ancillary services. Id.

The ALJ concludes that the Company's capital structure and cost of capital has changed in the six years since the last base rate case decision and, while recognizing that this is not a base rate case, finds it reasonable to adopt, for purposes of calculating stranded costs, the revised discount rate proposed by the RPA, which includes a 10.25 percent cost of common equity. I.D. at 42. The ALJ agrees with Staff and the RPA that certain adjustments should be made regarding the issue of FASB-90. He also agrees with Staff and the RPA that an adjustment to Salem O&M expenses proposed by RPA witness Henkes should be recognized. The ALJ rejects the RPA's proposed adjustment for post-retirement benefits (FAS-106), finding the Board's accounting treatment of this issue to be dispositive. Id. The ALJ concurs with Staff and the RPA that an appropriate adjustment should be made to reflect the timing and actual future expected costs after the cessation of the Levelized Energy Adjustment Clause ("LEAC") and roll-in into base rates and that a final LEAC true-up should be conducted, to safeguard ratepayers and prevent the Company from earning an excessive return. Id.

Given the numerous adjustments which he recommends be made to the original PSE&G proposal, the ALJ was unable to quantify a specific stranded cost amount for the Board's consideration. However, he recommended that the parties conference on this issue and submit to the Board a stranded cost figure that incorporates his findings and recommendations. I.D. at 42-43.

The Board notes that the parties did indeed conference on this issue, but were unable to reach a consensus view on the precise quantification of the ALJ's decision. By letter dated November 18, 1998, Staff forwarded to the Board, the ALJ and the parties the results of a quantification of stranded costs resulting from the I.D. as computed by the Auditors using the models they sponsored during litigation. Three scenarios were provided in that analysis, which varied by the treatment of inflation adjustments which were unspecified in the I.D. The three scenarios ranged from a low, net of tax stranded cost quantification of $2.485 billion, to a medium $2.949 billion, to a high of $3.310 billion. These calculations represent the Auditors' interpretation of the I.D. and do not necessarily represent the position of Staff or the Auditors in the case.

B. Mitigation Strategies to Meet Rate Reduction Targets

The ALJ notes that the Board made clear in its discussion of the question of stranded cost recovery in its Final Report that, prior to the Board entertaining a utility's request for a level of stranded cost recovery, the utility must make a good faith effort to undertake appropriate strategies to mitigate the level of stranded costs. I.D. 43-44. At pages 43 through 54 of the I.D., the ALJ summarizes the Company's case with respect to mitigation, and discusses in detail the testimony and positions of the parties as well as the Company's response thereto with respect to this issue.

The ALJ's findings on this issue are discussed at pages 54 through 59 of the I.D. While noting the Board's prior statements that the instant cases were not to be construed as base rate cases, the ALJ also cites and relies upon the Board's determination, in a February 1998 Order, that testimony addressing the Company's current cost of capital should not be struck and that a reevaluation of the cost of capital could be viewed as a legitimate mitigation measure. He concludes that a 10.15 percent cost of equity, with the capital structure recommended by the RPA, is reasonable for purposes of calculating funds available for possible mitigation. The ALJ

finds that the analysis provided by Dr. Vander Wiede on behalf of PSE&G, supporting a return on equity for the Company of 12.3 percent, is inaccurate and skewed and results in an exceedingly high return on equity. The ALJ utilizes the study performed by the RPA's expert, but adjusts that recommendation by 100 basis points to reflect higher risk associated with the move away from traditional regulation. The ALJ emphasizes however, that this finding is solely for the purpose of quantifying stranded costs and should not be used to infer that the Company is earning an excessive rate of return vis-a-vis its currently existing base rates. I.D. at 54-55.

With regard to the objection raised by the Company to RPA witness Henkes' analysis of 1996 earned return, specifically concerning Accumulated Deferred Investment Tax Credits ("ADITC"), the ALJ finds merit in the Company's objections. He also concludes that Mr. Henkes did not make a weather normalization adjustment in his analysis. I.D. 55-56.

The ALJ concurs with the RPA's position that due consideration should be given to the expected $35 million annual cost savings from the expiration of certain plant abandonment amortizations. The ALJ concurs with the Staff and RPA argument that the LEAC should be reviewed prior to its roll-in into rates to ensure that an appropriate going-forward level of recovery is rolled into base rates, and finds that rolling the current level of recovery into rates would clearly and inappropriately produce excessive earnings. I.D. at 56. He also concludes that the RPA position, joined in by Staff and the CFC, that competitive services revenues be recognized as an offset to stranded costs, is appropriate and should be given recognition by the Board. Id.

With regard to NUG contract cost mitigation, the AU concludes that the Company appears to be making a good faith effort to renegotiate these contracts, and that any recommendations to penalize the Company at this point for failing to renegotiate contracts with its affiliates is, at best, premature. He finds that the Company's performance can be

reviewed and the ratepayers sufficiently protected via the annual NUG recovery mechanism. I.D. at 57. The ALJ finds in favor of the Staff position that any revenue enhancements that the Company experiences during the transition period should be used to mitigate stranded costs.

The ALJ disagrees with the elasticity adjustment proposed by Staff, since the underlying DSM and private plant assumptions are highly speculative. Moreover, he rejects the Auditors' overall elasticity adjustment as being misplaced, dated and fatally flawed, since the underlying study is not based on PSE&G-specific factors. I.D. at 58. The ALJ also rejects the Auditors' estimate that the Company could realize up to $850 million of additional mitigation with cost savings in the areas of capital, operation and maintenance, administrative and general, fuel, etc., finding that such savings are overstated and unobtainable. The ALJ notes that it was demonstrated that the Company is a regional leader in cost containment and finds that PSE&G has made a reasonable forecast regarding future cost reductions.

The ALJ also rejects Staffs recommendation to reflect "natural mitigation" initiatives, finding insufficient record support to demonstrate that the depreciation of existing generation assets will mitigate stranded costs. I.D. at 59. He also rejects the Auditors' conclusion that the Company will experience a reduced cost of capital during the transition period (other than through securitization), finding it highly speculative. Id. He also rejects the Staffs contention that sales levels as of 1997 have already reached the projected levels for 2002. Finally, the ALJ finds some merit in the NJICG and NJBUS recommendation that stranded assets are no longer used and useful and should earn a reduced rate of return as a further form of mitigation, but cautions that such adjustment could have deleterious effect on the Company, Suggesting that the Board may wish to consider such an- adjustment in the total context of the rate reduction award and the final restructuring plan.

C. Rate Reduction

In its Final Report, the Board stated as one of Ks primary goals in the restructuring of the electric industry, the provision of a near term reduction in rates "on the order of 5-10%." Final Report at 114. At pages 60 through 64 if the I.D., the ALJ provides a discussion of the various parties' positions and arguments with respect to the appropriate level of rate reduction. The Company proposed a rate reduction of 6.7 percent, based upon its proposed level of securitization, as well as its proposal to extend distribution depreciation lives and to amortize the excess distribution depreciation reserve of $568.7 million. The RPA recommended a 15 percent rate reduction, assuming a seven year transition period. NJICG and NJBUS recommended an immediate 10 percent rate reduction, and another 2 percent reduction by October 1, 1999, producing a total reduction of 12 percent. NJCU recommended a 10 percent rate reduction. The Auditors recommended a range of reductions from 81/2 to 14 percent. The ALJ notes that Staff did not articulate a specific number, but implicitly adopted a 10.37 percent recommended reduction in its brief, based upon the Auditors' findings, and offered various recommendations for consideration. The ALJ concludes that the most appropriate level of rate reduction lies in a range of from 10 to 12 percent and that this level of rate reduction will not unduly impair the Company's financial condition. I.D. at 64-65.

D. Securitization

The Board's Final Report recognized that securitization is one of the elements that a utility may employ in developing a program to achieve rate reductions. At pages 65 through 67 of the I.D., the ALJ discusses PSE&G's proposal to securitize $2.5 billion of its total net of tax stranded costs with 15 year bonds, as well as the parties' positions related thereto. PSE&G's proposal was projected to produce annual savings to customers of approximately 2.7 percent, based upon an assumed interest rate of 7.5 percent. The ALJ concludes that the Company's proposal is consistent with the Board's Final

Report, and that it will result in reasonable savings which will be flowed back to ratepayers, and should be adopted. I.D. at 68. The ALJ declined to consider Staff's objections, which were adopted by the RPA, to the proposed collection of taxes through the securitized bond charge, since Staffs alternative proposal, including schedules supporting Staffs position, was not introduced until the briefing stage of the case.

E. Unbundled Rates

1. Use of 1995 Cost of Service Study

At page 69 through 71 of the I.D., the ALJ discusses the Company's reliance upon a 1995 cost of service study ("COSS") in support of its rate unbundling filing, and the objections of numerous parties (Staff took no position on this issue) to this study as not complying with the Final Report, as well as certain recommended adjustments thereto. The Board's Final Report had directed that rates be unbundled based upon "the cost of service study utilized, consistent with BPU-approved cost allocation methodologies, in the last base rate case when current base rates were established." Final Report at 151. PSE&G's last base rate case was based upon a test year ending June 1992, with a cost of service study based on calendar year 1990. At page 71 of the I.D., the ALJ concludes that the Company's actions in filing a 1995 study were inappropriate and deserving of adverse comment; however, he notes that this is the only evidence available in the record and that all parties have had an opportunity to review and criticize it. He therefore concludes that the Board will be presented with a full factual record upon which to decide whether the updated 1995 cost of service study will satisfy its requirements, or whether it would be more appropriate to order the Company to submit a study based on the 1992 base rate case.

2. Functionalization of Costs

The Board's Final Report provides for the unbundling of existing rates and for rates based upon the proper functionalization of costs and expenses to production,

transmission, distribution, and customer components. Final Report at 151. At pages 71 through 78 of the I.D., the ALJ discusses the Company's proposed functionalization of costs in PSE&G's cost of service study, and the parties' positions related thereto. He concludes that the Company's use of a 1995, as opposed to a 1992, cost of service study has resulted in substantial shifts in the functionalization of costs among various classes, and particularly between distribution and production classes. I.D. at 77. He concludes that the proposed functionalization is proper, except as follows. He accepts the RPA position that Gross Receipts and Franchise Taxes ("GR&IT") should be reallocated to reflect the new tax law, and that the requested reallocation of the GR&IT in the 1995 period is also justified. He concurs with recommendation of MAPSA's witness to reallocate $13.7 million in marketing and sales expense to generation. He concurs with Staffs recommendation to reject the proposal to use a $19.84 million placeholder for ancillary services. He also concurs with Staff that the Federal Energy Regulatory Commission ("FERC")-approved tariff rate of $161.5 million for unbundled transmission is more appropriate than the Company's proposed $173.2 million. He concurs with Enron's witness that $22.49 million associated with bad debts and uncollectibles and $2.3 million for regulatory commission expense should be separated from the distribution function. He further concludes that the Lower Delaware Valley transmission system costs should be reallocated on a dual demand and energy basis. I.D. at 78.

F. Segregation of Rates into Functional Components

1. Unbundling/Rebundling

The ALJ notes that, notwithstanding the Board's directive in the Final Report, PSE&G did not submit fully unbundled rates in its filing, and discusses the objections of numerous parties to the PSE&G proposal. I.D. at 79-81. The ALJ also notes that the Auditors discussed certain potential benefits and shortcomings of the PSE&G proposal and

suggested two possible alternatives to the Company's proposal. I.D. at 81 to 82.

The ALJ finds that the Company's failure to fully unbundle rates is not in accord with the Board's directives in the Final Report and will have the effect of stifling future competition and making customer choice difficult. He further finds that the Auditors' second suggested alternative, to partially rebundle non-competitive rates and implement an implicit Market Transition Charge ("MTC") including a rate cap, with explicit and separate energy and capacity credits, has merit and warrants the Board's consideration. I.D. at 83.

2. Market Credit/Capacity Credit

The ALJ describes the Company's proposal to implement a market energy credit ("MEC"), by which customers who choose a third party supplier would receive a credit on their PSE&G bill based on their hourly usage at each hours market price of energy, defined as the PJM hourly wholesale spot market price, as well as PSE&G's proposal to implement a capacity credit in the future only when a liquid and visible PJM capacity market develops. Id. The ALJ summarizes the concerns with this proposal raised by the RPA, Enron, NJBUS, NJICG, MAPSA, and Staff. I.D. at 84-87. These concerns include arguments by a number of parties that an energy-only credit would be extremely difficult for suppliers to beat, and arguments that the credit must include a retail cost adder.

The ALJ concludes that an energy-only MEC is not responsive to the Board's Final Report and may well have the effect of stifling competition by making it extremely difficult for alternative suppliers to compete against the Company. I.D. at 87. He disagrees with the Company's assertion that third party suppliers can easily dispose of their capacity through sales to other buyers, and finds unpersuasive the Company's arguments that it must maintain the capacity obligation to assure generation adequacy and reliability during the transition. Id. He endorses the proposal sponsored

by Enron that, until a liquid and visible market for capacity exists in the PJM system, the market capacity credit should be based on the loss-adjusted market capacity prices that PSE&G used to develop its stranded cost estimates, and should be included as a component of its MEC. Id. The ALJ concludes that the Company has already understated the level of credit that should be reflected in customer bills, and finds merit in the arguments of those parties that argued for the inclusion of some level of retail adder. I.D. at 88-89.

3. Implicit/Explicit MTC

The Board directed in its Final Report that a specific market transition charge, in the form of a separate non-bypassable component of each customer's electric bill, must be established for each utility. Final Report at 116. The Company chose not to include a specific market transition charge in its proposal, but instead proposed to freeze rates for a seven year transition period. The ALJ summarizes the Company's position as well as various parties' objections to or positions regarding that proposal. I.D. at 90-92. The ALJ concludes that the Company's proposal fails to comport with the specific directive of the Final Report that an explicit MTC calculation be made and that this be reflected as a separate unbundled charge. I.D. at 92. He further concludes that the Company's proposal for an implicit MTC, absent any form of tracking, periodic review or true-up, creates the real possibility that PSE&G may over-recover stranded costs. Id. The ALJ finds no specific merit in the PSE&G proposal that would outweigh the clear dangers associated therewith and, as a result, concludes that PSE&G should be required to develop an explicit MTC. I.D. at 92-93.

4. Societal Benefits Charge

The Board directed in the Final Report that each utility include in its rate unbundling filing a societal benefits charge ("SBC"), as a per unit charge, to separately collect the costs currently embedded in rates associated with the current provision of "DSM, gas plant remediation, nuclear

decommissioning and societal programs including winter moratorium, 'bad debt' customers, low income assistance and weatherization and existing late payment and deposit policies." Final Report at 149. At pages 93 and 94 of the I.D., the ALJ discusses the Company's proposal in its filing for the implementation of an annually-adjusted SBC, which provides for interest on both under and over recoveries and which includes the collection of NUG costs and gross receipts and franchise taxes in addition to other elements such as demand side management, environmental remediation costs, nuclear decommissioning, nuclear fuel disposal, uncollectibles and restructuring costs. The ALJ notes that GR&IT and NUG costs are not provided for in the Board's definition in the Final Report of a SBC. The ALJ discusses the parties' opposition to various aspects of the Company's proposal. I.D. at 94-96. The ALJ concludes that the Company's proposal is reasonable, since the annual adjustment mechanism allows for annual review of the SBC sub-components and will allow the Board full control over the level and reasonableness of these charges. I.D. at 96. However, he agrees with the position expressed by Staff and other parties that NUG costs should be removed from the MTC and that a separate NLIG charge be created instead, which charge will be reviewable on an annual basis, as will the SBC. This will permit the timely pass-through to ratepayers of the benefits of any NUG contract renegotiations. I.D. at 97. He further agrees with the Staff position that restructuring expenses, when they are readily ascertainable, should be shared equally between customers and shareholders. He rejects the claims by certain intervenors that the SBC does not fully allocate costs in conformity with the Company's cost of service study, and disagrees with the RPA proposal that the benefits of NUG renegotiation be shared, finding it premature, given his finding that there be an annual review of NUG costs. Id. The ALJ concurs with the RPA position that the inclusion of GR&IT in the SBC is misplaced, since such treatment would have the effect of shifting costs from the generation to the distribution function. I.D. at 97-98.

5. Securitization Transition Charge

With regard to the Company's securitization transition charge ("STC") proposal, the ALJ concurs with the RPA that the Board should expressly order that the securitization funds collected through the STC be used solely to benefit ratepayers. I.D. at 98. He further concurs with the RPA and finds that the expenses of the securitization financing should not be borne solely by ratepayers, but rather should be shared, since both customers and stockholders will benefit by securitization. Id.

6. Competition Transition Charge

The ALJ makes no findings with regard to the Company's proposal to implement a competition transition charge ("CTC") applicable to on-site generation. The ALJ notes that the parties' objections related to this issue were of a generic nature, and that the question is before the Board as a separate matter. The ALJ leaves this issue to the Board for evaluation in the confines of that docket after the Legislature has addressed this issue. I.D. at 99.

7. Impact of Proposed Unbundled Rates/Revenue Neutrality

In the Final Report, the Board directed that rates be unbundled based on an embedded cost of service analysis which would achieve complete revenue neutrality on a company-wide basis relative to existing rates, and inter-class and intra-class revenue neutrality relative to existing bundled rates. Final Report at 150. The ALJ summarizes PSE&G's proposal with respect to this issue and the various parties' exceptions thereto. I.D. at 100. The ALJ finds and recommends that, assuming the Board employs the 1995 cost of service study, the Company be required to reevaluate its unbundled rates, via the customer charge, to more appropriately reflect actual revenue neutrality. Id.

III. EXCEPTIONS AND REPLY EXCEPTIONS

Numerous parties filed extensive Exceptions and Reply Exceptions to the Initial Decision. These largely reiterated the positions advocated by the parties during the hearings. Some of the key arguments raised by the parties in their Exceptions and Reply Exceptions are summarized hereinbelow.

A. Exceptions

1. PSE&G

While noting that the ALJ has "substantially agreed" with the Company as to the recommended level of stranded costs, PSE&G filed 119 pages of Exceptions, wherein it takes issue with a number of positions adopted by the ALJ. Among the issues addressed by PSE&G relative to stranded costs are post-1992 base rate case capital additions to generation (PSE&G Exceptions at 4-11); applicable test methodology (Id. at 12-54); mitigation strategies (Id. at 55-71); rate reductions (Id. at 72-80); securitization (Id. at 81-82); and electric and gas allocators (Id. at 83-84). Specifically, with respect to post-1992 capital additions, the Company argues that a retroactive market test is not applicable (Id. at 4), and takes exception to the ALJ's removal of $85 million budgeted for the Salem Unit 2 Steam generator replacement. Id. at 9.

With respect to unbundled rates, PSE&G defends its use of the 1995 COSS (Id. at 85-95) and takes exception to a number of the ALJ's recommendations concerning functionalization of costs (Id. at 96-102); segregation of rates into functional components (Id. at 103-116); and revenue neutrality (Id. at 117-118).

2. Ratepayer Advocate

The RPA similarly filed 120 pages of Exceptions addressing numerous aspects of the ALJ's recommendations with respect to PSE&G's rate unbundling and stranded cost filings. With respect to stranded costs, the RPA argues that PSE&G's claim for automatic, unconditional and full

recovery of stranded costs has no basis in law, economics or logic. (RPA Exceptions at 12-32). The RPA contends that the ALJ properly found that PSE&G was required to meet a market test for post-rate case capital expenditures and asserts that PSE&G has not satisfied that test. Id. at 33-34. Specifically, the RPA takes exception to the ALJ's allowance of post-rate case capital additions for Bergen 1, Mercer and Salem. Id. at 33-48.

Among the other stranded cost issues addressed by the RPA are: NUG contract related stranded costs (Id. at 52); quantification of stranded costs (Id. at 53-87); mitigation (Id. at 87-92); rate reduction (Id. at 92-95): securitization (Id. at 95-99); the market transition credit (Id. at 99-100); and the energy-only credit and shopping credits. (Id. at 100-102).

With respect to rate unbundling, the RPA objects to the Company's use of the 1995 COSS, arguing that it pervaded and distorted the Company's entire unbundling case, resulting in massive cost shifting among functions and a lack of revenue neutrality. Id. at 105. Among the other unbundling issues addressed by the RPA are cost functionalization issues (Id. at 109-115): the societal benefits charge (Id. at 115-118); and the securitization charge (Id. at 118-119).

3. BPU Staff

In its Exceptions, Staff notes that the ALJ had chastised Staff for introducing in its Initial Brief positions and recommendations for the first time. Staff contends that this is not a new issue in administrative proceedings but, rather, is an issue which has been repeatedly decided in Staff's favor in multiple forums. New Jersey Dep't of the Pub. Advocate v. New Jersey Bd. of Pub. Utils., 189 N.J. Super. 491, 518 (App. Div. 1983); I/M/O New Jersey Natural Gas Company, BPU Docket No. GR90030335J (July 17, 1990); Coalition for Fair Competition v. New Jersey Bd. of Pub. Utils., A-6069-95T1, page 23 (App. Div. 1998). Staff. argues that there was no basis for the ALJ to ignore these precedents and reject certain

of Staff's positions and recommendations as set forth in its brief as being extra-record. (Staff Exceptions at 4).

Staff takes exception to the inclusion of certain post base rate case capital additions. Id. at 5-11. Staff argues that PSE&G should be held responsible for the above market costs of Bergen I. Id. at 8. With respect to the Salem steam generator replacement, Staff notes that while it has opined that the steam generator project could be deemed recoverable under a specific test if applied by the Board, there clearly is sufficient basis for the Board to put PSE&G at risk for those expenditures and deny recovery as stranded costs. Id. at 10. Staff continues to recommend its positions set forth in its brief with respect to certain exclusions of pre- and post-steam generator projects. (Staff Initial Brief at 13-14).

Staff takes exception to the recommendation of the ALJ that market clearing price forecasts of PSE&G be adjusted to determine a single specific level of stranded costs. Id. at 12-20. Staff also argues that the ALJ, in discussing the Company's stranded cost estimates, fails to distinguish between net-of-tax and revenue requirement amounts. Id. at 21-25. Staff further argues that the ALJ erred in allowing a 100 basis point risk premium in his calculation of return, if any, allowed as a component of generation related stranded cost recovery through the MTC. Id. at 26-31.

Staff argues that the ALJ failed to propose adequate mitigation strategies. Id. at 32-34. Staff takes the position that the proposed gross-up for taxes related to securitization is not required nor appropriate for inclusion in the securitization transition charge. Id. at 35-39. Finally, Staff takes exception to various adjustments and positions of the ALJ concerning unbundling. Id. at 40-50.

4. Co-Steel Raritan

Co-Steel takes service from PSE&G pursuant to a ten-year service agreement. It argues that its contract precludes the imposition of all stranded cost related charges regardless of the precise form they may take once this proceeding has

run its course. This includes any stranded costs related charges that may exist after the current contract expires. Co-Steel argues that such post-contract stranded cost charges would violate the terms and intent of its contract and constitute an unconstitutional contract impairment. (Co-Steel Exceptions at 2). Co-Steel notes that the ALJ did not address this issue in the I.D. and contends that the I.D.'s silence on this issue "implicitly" appears to determine that stranded costs charges would apply to Co-Steel. Co-Steel contends that this is improper and contrary to "substantial evidence" in the record on this issue. Id.

5. The Coalition for Fair Competition

The CFC objects to the ALJ's determination to exclude from evidentiary consideration testimony filed by its expert witness relating to issues of fair competition and argues that stranded costs cannot be accurately quantified unless and until the utilities are required to mitigate fully by dedicating revenues from competitive assets. The CFC argues that the Board should remand this docket to the ALJ along with instructions that the record be re-opened in order to hear and consider testimony submitted by the CFC and all interested parties concerning the issue of fair competition. (CFC Exceptions. at 1-3).

6. County of Passaic

The County of Passaic agrees with the ALJ's finding that PSE&G's failure to fully unbundle rates is not in accord with the Board's Final Report and will have the effect of stifling future competition and making consumer choice difficult. (Passaic Exceptions at 2). The County of Passaic argues that the Board should ensure that all rate classes, and particularly Street Lighting Service, are unbundled. Id. at 4.

7. Independent Energy Producers of New Jersey

IEPNJ asserts that the I.D. should have more clearly stated that the NTC should be trued-up annually. (IEPNJ Exceptions at 3). Additionally, it asserts that for the I.D.

should have recommended that the NUG recovery cost vehicle be made part of the SBC. Id. It also argues that the I.D. should be clarified with respect to "going forward costs." While IEPNJ agrees that some ongoing level of capital expenditures will be necessary to factor into PSE&G's market valuation of its generating assets, it argues that a "bright line" test is needed to ensure against anti-competitive subsidization of the utility generation function. Id. at 2-3.

8. Mid-Atlantic Power Supply Association

MAPSA endorses the ALJ's finding that there is a need for a retail adder to provide a reasonable Market Energy Credit. It argues, however, that the Initial Decision does not reflect in the MEC the full retail cost of supplying electricity at retail. It argues that costs such as generation-related customer service costs, generation-related auxiliary service costs, marketing and advertising costs and generation-related administrative and general expenses need to be added to the MEC. (MAPSA Exceptions at 2-5). MAPSA asserts that its witnesses provided reasonable quantifications of the retail costs that need to be reflected in the MEC and urges the Board to implement the I.D.'s findings on the need for a retail adder using its witnesses' retail adder quantifications. Id. at 2. MAPSA further argues that there should be annual true-ups of the MEC to allow customers sufficient time to decide whether or not to shop. Finally, MAPSA argues that the ALJ erred in failing to utilize different rates of return in functionalizing costs. Transmission and Distribution Services assertedly are not as risky as generation and, thus, have different appropriate rates of return. Id. at 8-10.

9. New Jersey Business Users

NJBUS argues that PSE&G's post-1992 rate base additions should not be included in calculating its allowable stranded cost recovery. (NJBUS Exceptions at 18). NJBUS further argues that the ALJ correctly concluded that Bergen, Linden and Salem were not grandfathered from the Board's market test requirement, but that he erred by recommending

that these projects be included in PSE&G's stranded cost allowance. Id. at 20-37.

NJBUS argues that the ALJ erred in not adopting NJBUS' methodology for calculating PSE&G's stranded costs, and argues that the ALJ's recommendations are flawed in regard to the methodology for calculating the price of capacity and other cost estimates. Id. at 41-53.

NJBUS also raises certain concerns with respect to mitigation (Id. at 54-56) and securitization (Id. at 73-76), and objects to the use of the 1995 cost of service study (Id. at 77). NJBUS argues that there is ample support in the record for a rate reduction of 20% (Id. at 69-72), and further argues that there should be an equal, fixed and explicit MTC for Basic Generation Service ("BGS') customers and customers of other suppliers (Id. at 84).

10. New Jersey Commercial Users

NJCU argues that PSE&G's proposed distribution depreciation change should not be counted towards the mandated rate reduction. (NJCU Exceptions at 2). NJCU urges that, within 24 months, the Board initiate a detailed review of PSE&G's costing and allocation methodologies to determine whether inter- and intra-class cost shifts are justified under more appropriate cost of service methodologies. Id. at 2. NJCU further urges the Board to initiate a proceeding and determine PSE&G's distribution revenue requirement within 24 months. Id. at 2-3. NJCA also argues that PSE&G should be required to develop an explicit MTC. Id. at 3.

11. New Jersey Industrial Consumer Group

NJICG argues that the ALJ erred by permitting inclusion of virtually all post-base rate case additions in PSE&G's stranded cost calculations, and that PSE&G's submissions concerning these additions fail to meet the standards for recovery set forth by the Board in the Final Report. (NJICG Exceptions at 3-11). NJICG raises concerns about PSE&G's

proposal not to divest its generating assets and argues that the Board should permit no equity return on stranded assets. Id. at 11-14. NJICG also argues that the Initial Decision erred in recommending adoption of PSE&G's securitization proposal and that PSE&G's use of an updated cost of service study as the basis for unbundled rates should be rejected. Id. at 19-26.

12. New Jersey Public Interest Intervenors

NJPII argues that it appears that the primary factor that led to the ALJ's recognition of post test year capital expenditures is the voluminous nature of the material presented by PSE&G. (NJPII Exceptions at 2). NJPII asserts that only 10 pages of the 219 page exhibit which addresses PSE&G's post rate case expenditures at Salem provides any alleged economic comparison of the replacement of the steam generator with other supply options. Id. at 2-3. The NJPII also asserts that the ALJ erroneously failed to address flaws in the evidence as identified by NJPII. Id. at 3-6.

NJPII takes issue with the ALJ's refusal to consider the issue of divestiture, and raises concerns regarding recovery of going forward costs, and administrative and general costs. Id. at 11-20. NJPII also reiterates its position that securitization should not be allowed to extend to stranded costs associated with NUG contracts. Id. at 22-23.

13. New Jersey Transit Corporation

NJT notes that the Initial Decision, in spite of its recognition of PSE&G's failure to use the appropriate COSS, makes no findings as to the appropriate remedy. NJT asks that a second phase of the unbundling proceedings be commenced to update PSE&G's COSS. (NJT Exceptions at 2). Additionally, NJT argues that the Board should order that PSE&G's proposed rate decreases be allocated on cost based principles and not on a uniform percentage basis. Id. at 3.

14. Tosco

Tosco argues that PSE&G's proposed Departing Load Tariff undermines Board policy because it would lead to less

choice and higher monopoly rates. (Tosco Exceptions at 6-14). It further argues that the proposed Departing Load Tariff is not a legitimate stranded cost that any customer should pay for. Id. at 14-20.

B. Reply Exceptions

In light of the vast record in this case, most of the parties either relied upon earlier submissions in lieu of filing Reply Exceptions or filed limited Reply Exceptions reiterating key points or responding to specific assertions made the Company in its Exceptions. Two parties, however, PSE&G and the RPA, filed extensive Reply Exceptions of 170 and 80 pages respectively. In general, these Reply Exceptions reiterated PSE&G's and the RPA's previously articulated positions. PSE&G and the RPA also addressed and responded to certain positions advocated by Board Staff in its Exceptions, as well as the arguments raised by various other parties in their Exceptions. While the Board has reviewed and carefully considered all the Exceptions and Replies to Exceptions, because of the voluminous record, we will highlight only a few of the arguments made by PSE&G and the RPA in their Reply Exceptions.

1. PSE&G

With respect to post-rate case capital additions, PSE&G argues that Bergen, Linden, Mercer and Salem were all not subject to a market test. With regard to Salem, PSE&G argues that the intervenors' assertion that the ALJ has improperly shifted the burden of proof is incorrect and further argues that the various arguments of other parties for disallowance of the post-1992 capital additions are without merit. (PSE&G Reply Exceptions at 39-76).

With respect to unbundling, PSE&G again argues that use of the 1995 COSS is practical and correct and provides the Board with a reasonable basis upon which to proceed to authorize the commencement of competition. Id. at 144. The Company notes that its last base rate case was resolved by Stipulation and that there was no explicit Board approved

COSS. PSE&G argues that reliance upon the 1995 COSS is appropriate based upon the record that was developed in this case and that reconstruction of a COSS based upon a 1992 revenue requirement would cause unnecessary controversy, litigation and delay.

With respect to the argument raised by Co-Steel in its Exceptions, PSE&G contends that there is no language in the Service Agreement that absolves Co-Steel from paying any stranded costs either during or after the term of its Service Agreement. During the term of the agreement, to the extent it takes power under the HTS Tariff rate, it would be subject to whatever happens to that rate as a result of restructuring. After the Service Agreement expires in 2005, Co-Steel would be no different than any other customer on its distribution system. Id. at 169-170.

2. Ratepayer Advocate

With respect to post-rate case capital additions, the RPA again reiterates that PSE&G was required to meet a market test for inclusion of stranded costs related to post-rate case capital additions and that PSE&G did not satisfy the market test for the post-rate case capital additions for which it is requesting stranded cost recovery. (RPA Reply Exceptions at 5-18).

The RPA also argues that the ALJ properly concluded that PSE&G's use of the 1995 COSS was inappropriate and will not yield revenue neutral unbundled rates. Id. at 64-72.

IV. RESTRUCTURING PROCEEDING

As noted above, evidentiary hearings were held before Commissioner Carmen J. Armenti on certain identified restructuring issues from April 27, 1998 through May 28, 1998. This was followed by the submission of Briefs and Reply Briefs on generic and nongeneric restructuring issues. Key elements of the briefed positions of various parties with regard to certain specific, non-generic restructuring issues of

relevance to the PSE&G filing are summarized hereinbelow, by issue.

A. Basic Generation Service

1. Pricing and Contract Terms and Options

PSE&G did not propose a specific BGS rate, but rather has proposed a monthly pricing option, whereby the Company will either buy power from the spot market to supply BGS customers or purchase wholesale power via monthly contractual obligations. (Exhibit PS-32, pp. 3-4). Under the PSE&G proposal, the BGS rate would change monthly. PSE&G indicates that under its proposed pricing option, the customer would not be required to make a long term commitment for BGS service.

The RPA proposes that all utilities solicit competitive bids for sufficient capacity and energy to supply BGS for an initial two year period. The RPA proposes that energy suppliers would put in a bid to the local distribution company ("LDC") to provide energy and capacity for BGS for a two-year period. (Exhibit RA-13, p. 49). The RPA indicates that this could include short-term, as well as portfolio purchases. The RPA asserts that this will ensure that BGS customers will benefit from a competitive energy market, and will also result in less price volatility than with a BGS price that fluctuates over a short time frame. The RPA points out that under its proposal there would be no need for a true-up, because the risk of market price fluctuations would be on the successful bidder.

Staff, in its Initial Brief, supports the concept advocated by several of the utilities in this proceeding by which the utility/basic generation provider would match supply commitments with customer commitments. (Staff Initial Restructuring Brief ("IRB") at 70). Proposed options include a monthly pricing option for customers who do not want a long term BGS commitment, where supply is purchased from the spot market, geared to customers to whom price stability is not of greatest concern and who will most likely choose to

participate in customer choice; or an annual or a six month fixed pricing option for customers not choosing to participate in customer choice, who are looking for price stability similar to that experienced prior to restructuring, where supply is purchased by the utility on either an annual or bi-annual contract. Staff points out that the aim of any matching concept is to have a portfolio of supply commitments which matches customer commitments, both in terms of price paid versus the price received for power by the utility commitment and the duration of the purchase commitments. Staff further indicates that under the matching concept there is a limited opportunity for a large under- or overrecovery of deferred balances to accumulate, thus limiting any distortion of the prices for basic generation service. Id. Staff maintains that price distortion has the potential to lead to gaming by market participants, and can otherwise send incorrect pricing signals to customers. Accordingly, it is Staff's position that, in order to provide a smooth transition to competition, the Board should require each electric utility to provide BGS customers the opportunity to select from either a fixed price option, or a monthly pricing option for, BGS service. Id. at 70-72.

2. BGS Price/Shopping Credit

PSE&G proposed that its BGS rate/shopping credit should be set at the sum of the PJM market price for energy, plus the cost of line losses, associated taxes and the avoided incremental administrative and general cost of power procurement associated with the energy delivered, referred to by PSE&G as the retail adder. PSE&G estimates this retail adder to be .0014 cents per kilowatt-hour. (Exhibit PS-32,p.14). PSE&G further indicates that as soon as a liquid and visible market for capacity is established the generation component of the BGS rate will include a capacity component as well. PSE&G asserts that the retail adder should be based on the avoided incremental administrative and general cost of PSE&G providing power to customers and not the imputed costs of a hypothetical marketer. PSE&G indicates that the product of this calculation is the amount that customers on

BGS will pay for the generation component of BGS and will also act as the amount that customers who choose an alternative supplier will receive a bill credit. PSE&G asserts that this credit will serve a competitive benchmark for customers choosing an alternative supplier and should be equal to the total avoided cost of PSE&G for serving that customer. (PSE&G IRB at 68).

The RPA proposes that the BGS rate/shopping credit be based on a competitive bid process for both energy and capacity. (Exhibit RA-15, p. 4). The RPA asserts that the competitive low bid, which should be reviewed by the Board, would become that utility's standard offer rate for generation under BGS, and would also need to include a retail, margin encompassing administrative and general costs incurred serving retail customers, including a cost for marketing. The RPA argues that the competitive bid process will also provide the Board with a benchmark price for both energy and capacity, which will provide a starting point for the determination of the appropriate shopping credit, including a retail margin composed of marketing and A&G costs associated with generation for customers who exercise their right to choose an alternative supplier. The RPA proposes that the shopping credit be set at a level that appropriately reflects PSE&G's generation and marketing costs to serve retail customers, and is sufficient to attract alternative energy suppliers.

Enron proposes that the rate for BGS should be the sum of the prices for the unbundled components of BGS, capped (after any Board mandated rate reductions) as approved by the Board. In Enron's view, the sum of these components would also become the shopping credit for those customers who choose to use an alternative energy supplier. (Exhibit Enron-35, pp. 34-35). Enron defines the shopping credit for generation as the amount remaining after the individual prices for transmission service, distribution service, and intangibles (societal benefits, stranded costs, securitization bond charge, etc) are deducted from the total rate cap. Enron asserts that

the shopping credit should equal the utility's fully embedded cost for generation less the market transition charge, which is a fixed charge. (Enron IRB at 104).

Enron argues that in developing the shopping credit, in order to ensure that competition develops in New Jersey, the Board should impute a cost to the wholesale price of energy for BGS that bears a meaningful relation to the cost of electricity for retail customers. As such, Enron asserts that the shopping credit would be the benchmark against which customers would determine whether it is financially beneficial for them to remain with BGS or consider choosing an alternative supplier.

MAPSA, representing many of the alternative suppliers in this proceeding, asserts that in order to set the proper generation rate, all components of retail cost must be reflected in the BGS rate. MAPSA indicates that the BGS rate shall be the retail rate against which all suppliers will compete. As such, MAPSA asserts that the BGS rate should include the wholesale price of energy and capacity, as well as marketing and administrative costs involved in providing competitive retail service, thus reflecting the full cost of supplying electricity at retail. MAPSA indicates that these marketing and administrative costs would result in about a 0.4 to 0.5 cents per kilowatt-hour increase to the BGS rate. (MAPSA IRB at 28).

New Jersey Citizen Action indicates that to the greatest extent possible, BGS pricing should be at the same level as the market clearing price, plus additional costs incurred by the LDC for purchasing electricity for BGS customers. (NJCA IRB at 13).

Staff, in its Initial Restructuring Brief, takes the position that the BGS price and/or the shopping credit should be based on market prices, resulting in BGS customers having access to market based pricing. (Staff IRB at 72). As such, Staff asserts that a BGS price and/or shopping credit that is based upon the market will most appropriately reflect the value of supply and

therefore send the most appropriate price signals. Staff further asserts that a BGS price which reflects current market conditions will provide the most appropriate benchmark for comparison shopping by BGS customers considering offers from competing alternative suppliers. Staff asserts that the BGS price must equal the shopping credit, that is, the amount being charged for generation services being supplied by the utility must be the same as the amount deducted (e.g. credited) from the utility portion of the bill if the customer no longer takes generation service.

Staff also shares the concern express by many of the alternative suppliers in this proceeding that a market-based BGS price or shopping credit must reflect the full cost of providing retail generation service and not simply reflect the wholesale price index. Id. at 75. Staff, however, points out that an artificial adder or margin should not be included in the BGS rate simply to stimulate the marketplace, since such artificial stimuli will only serve to distort the marketplace. Staff, however, asserts that in order to provide alternative suppliers with a fair opportunity to compete, appropriate retail-related generation costs must be included in the BGS price as an adder to the wholesale cost of power. Id.

B. Horizontal Market Power

PSE&G submitted a market power analysis prepared by witnesses Joskow and Frame in support of the argument that the Company lacks horizontal market power. (Exhibit PS-46). PSE&G argues that the record in this proceeding demonstrates overwhelmingly that it does not possess market power in the generation and power supply markets for the following reasons: the region's generation market is highly competitive; transmission constraints where PSE&G can impose market power are infrequent during the few hours of system constraint, markets in the eastern PJM region are competitive in every time period; concerns with local "load pockets" and must-run generation have been exaggerated and, in any event, are fully addressed through the PJM supporting companies' market based pricing proposal to the FERC,

incorporating a bid cap proposal; and PSE&G's rate cap proposal precludes it from exercising market power even if it had the ability to do so. (PSE&G IRB at 97-127).

The RPA, relying upon the testimony of its witness Peter Lanzalotta and MAPSA witness Craig Roach, asserts that none of the electric utilities have complied with the Board's directive to supply a comprehensive market power analysis, since those submitted by the electric utilities are flawed. (RPA IRB at 112). The RPA asserts that the record in this proceeding demonstrates a significant potential that, absent corrective action, one or more of New Jersey's incumbent electric utilities will be able to exercise horizontal market power within their service territories and in more localized areas. As such, in order to mitigate the potential for horizontal market power, the RPA urges the Board to direct each electric utility within New Jersey to submit a comprehensive market power analysis and mitigation plan, which should include divestiture, and to establish information reporting requirements and monitoring procedures. Id. at 121.

Enron asserts that because serious issues exist regarding the potential exercise of horizontal market power by New Jersey's utilities, the Board should actively monitor the competitive marketplace as it develops and take all necessary steps to prevent the exercise of market power by the utilities both within New Jersey and the PJM control area. (Enron IRB at 132.)

MAPSA, relying upon the testimony of its witness Craig Roach (Exhibit MAPSA-2), asserts that objective measurements of market power for firm power indicate that PSE&G maintains an unacceptable level of market power and, in an unregulated market, would be able to impose prices higher than those that a competitive market would provide. MAPSA asserts that the Board must mitigate PSE&G's horizontal market power, which, it suggests, could be remedied by at least a partial divestiture of its generation capacity. (MAPSA IRB at 39).

Staff asserts that on a region-wide basis and, importantly, based upon the current ownership configurations, there is no conclusive evidence of imminent market power problems in the PJM power pool. Staff further indicates that an updated market power assessment must be required as part of the review of any proposed sale of generating assets by ACE and PSE&G. As such, Staff recommends that an empirical market power study should be part of an ongoing regulatory monitoring process of potential or actual market power abuse, including a look at localized load pockets during certain hours. This monitoring process must include a cooperative effort of the Board and the PJM Independent System Operator ("ISO"). Staff asserts that the Board should obtain regular reports from the PJM ISO on information being obtained through its Market Monitoring Plan. Staff further points out that the price cap proposal by PSE&G does not, in and of itself, mitigate market power concerns. (Staff IRB at 86-92).

C. Incentives For Divestiture

PSE&G argues that it must retain its generation assets during a proposed seven year transitional period in order to offer a rate reduction and reliability guarantee, and that a forced divestiture of its generation assets will not advance the achievement of the Board's restructuring goals. (PSE&G IRB at 139). PSE&G further proposes that at the conclusion of the transition period, all its generation assets will be transferable at "net book value" to an affiliate of its parent company, Public Service Enterprise Group ("PEG"), that will be ""functionally independent" of the utility. (Tr. 3129-3130). PSE&G asserts that the Board has no authority to order divestiture, particularly in light of the Company's statutory obligation to serve. PSE&G takes issue with arguments raised be other parties who have cited examples of fossil generation asset sales above "book" value as evidence that forced divestiture will reduce the Company's stranded cost estimate and asserts that those arguments are flawed. PSE&G argues that the vast majority of its fossil generation assets are

valued above book, and the cited examples of above "book" value sales from other jurisdictions are irrelevant. Id. at 141.

The RPA argues that the divestiture of generation assets constitutes the most significant step in advancing the goal of retail competition in the market for electricity and realizing the attendant consumer benefits which flow therefrom. (RPA IRB at 138). The RPA points out that divestiture would provide an objective measure of stranded cost valuation and, in light of recent above-book value sales of generation facilities, a way to mitigate stranded costs. The RPA further points out that divestiture would also effectuate the ultimate form of functional separation, eliminating the need for extensive regulatory policing and potential for cross-subsidization, while simultaneously dispersing the ownership of generating units to alleviate market power concerns. The RPA urges the Board to require divestiture of generation assets as a precondition to any stranded cost recovery. Id. at 141.

Enron submits that the Board should reject PSE&G's "divestiture" proposal to move its generation assets to an affiliate at book value at the end of the transition period. (Enron IRB at 169). Enron contends that the proposal to shift PSE&G's generation assets to an affiliated company at an "accounting value" is fraught with the danger that ratepayers who paid for the PSE&G system will not receive sufficient value for their very significant investment and PSE&G could potentially obtain this portfolio of valuable resources at a fraction of their true value. Id. at 170.

Enron argues that the Board should encourage PSE&G to divest its generation assets in the near term to avoid the market power, functional separation and cross-subsidy issues that will otherwise hamper the Board in its efforts to monitor PSE&G and to likely reduce stranded costs. Enron suggests that one incentive the Board could offer PSE&G would be to condition PSE&G's ability to securitize its stranded costs (or a larger percentage of those costs) upon PSE&G's agreement to divest. Id. at 171.

MAPSA indicates that failure to take steps to require PSE&G to divest its generation assets will harm ratepayers by forcing them to overpay for regulated services and depriving them of the fruits of competition. (MAPSA IRB at 43).

IEPNJ identifies two incentives that the Board can consider relating to the divestiture of PSE&G's generation assets: the level of securitization which the Board permits on utility generation assets could be tied directly to divestiture; and/or, after determining the most reasonable estimate of stranded costs of utility assets through an administrative estimate, the Board could allow the utility to retain a share of any divestiture proceeds above that amount. (IEPNJ IRB at 8).

The New Jersey Public Interest Intervenors argue that to ensure that the emerging markets develop most efficiently, while providing utilities with the appropriate level of cost recovery for investments made under regulation, the Board must implement policies that encourage or require divestiture of utility owned generation. (NJPII IRB at 2-3).

New Jersey Citizen Action supports divestiture by all of the incumbent utilities as the fairest and most efficient mechanism for resolving a magnitude of restructuring issues, principally stranded cost recovery and market power. NJCA indicates that the Board should establish minimum requirements as a condition of such recovery. (NJCA IRB at 16).

Staff indicates that any incentives for divestiture should be related to stranded cost recovery assets, since divestiture removes the substantial uncertainty associated with administrative estimates. Staff further indicates that divestiture has the potential to reduce stranded costs below levels that might otherwise be experienced based upon administrative estimates, since significant premiums over book value have been experienced in recent generation divestitures. (Staff IRB at 104).

Absent divestiture, Staff asserts that the Company should have undertaken significant stranded cost mitigation measures, as a means to reduce the uncertainty associated with administrative stranded cost estimates. Staff suggests that it would be reasonable for the Board, in setting a stranded cost level for non-divesting utility, to impute a discount to projected stranded costs and/or to give greater weight to the higher end market value estimates for these foregone cost and risk mitigation measures. Staff further recommends that the Board should set a lower cap on the level of securitized bonds which a utility may issue when it has not established its generation market value via divestiture. Id. at 105-106.

D. PSE&G's Energy-Only Proposal

PSE&G in its filing proposes that during the transition period, all of its customers, except those taking service under specific contracts, be able to purchase their energy requirements from third party suppliers, while PSE&G would remain the provider of capacity for its customers. PSE&G indicates that an approach which would allow customers initially to purchase both energy and capacity from third-party suppliers is unworkable. In order to ensure that reliability is not sacrificed, PSE&G proposes to maintain all capacity obligations in its service territory, and will not offer a capacity credit to its customers choosing a third party supplier until a liquid capacity market that provides a visible price for capacity is established within PJM. (Exhibit PS-11, pp. 10-11).

The RPA indicates that PSE&G's energy-only credit proposal would discourage competitors from entering its service territory during crucial, initial period of retail choice. The RPA points outs that PSE&G's proposal would require customers who select an alternative supplier to effectively pay for a large portion of generation costs twice, once to PSE&G through its remaining bundled rates and once to a new supplier. (Exhibit RA-13, p. 54). The RPA further points out that the energy-only proposal is a concept that would stifle competition in PSE&G's territory before it begins, and result

in PSE&G having a de facto unregulated monopoly over generation suppliers. (RPA IRB at 41.).

Enron indicates that the record reveals that the energy-only proposal is a sham and a pretext for an unprecedented and unjustified attempt to erect a formidable barrier to competition that would virtually eliminate the benefits of competition to energy consumers in PSE&G's territory, as well as shielding PSE&G from financial risk should consumers elect to switch suppliers. (Enron IRB at 72-96).

PP&L argues that PSE&G's energy-only proposal is an unnecessary major barrier to competition in New Jersey's retail electric market. PP&L asserts that the PSE&G energy-only proposal would undercut competition and lead to a new phase of monopolistic control by PSE&G in its service territory. (PP&L IRB at 15).

MAPSA also opposes the energy-only proposal and raises substantially the same arguments against PSE&G's proposal as voiced by the other marketers. (MAPSA IRB at 22-24).

NJBUS argues that the PSE&G proposal would prohibit anyone but PSE&G from offering capacity contacts in PSE&G's service territory for at least two years. NJBUS points out that such a fragmentation of the New Jersey electric power market would frustrate the BPU's goal of uniform, statewide rules governing the introduction and implementation of competitive access, and should be rejected. (NJBUS IRB at 27-32).

1. Reliability Obligations Within PJM

PSE&G indicates that during the transition period, it will maintain the responsibility for reliability and customers' capacity requirements, thereby assuring electric customers that they will be able to freely shop for energy without reliability concerns. PSE&G argues that it should maintain this reliability responsibility because the Reliability Assurance Agreement (RAA) being developed for the PJM

system is a work in progress, and undue reliance on the RAA, PJM and the market during the transition period would, in PSE&G's view, be premature and pose an unacceptable risk. PSE&G points out that even after the RAA is executed and approved by FERC, it must still be tested and proven. PSE&G asserts that there is substantial evidence in the record supporting its reliability concerns that cannot be minimized. (PSE&G IRB at 34-45).

Enron indicates that the RAA is now and will continue to be the operative document that creates the approved method for assuring long term capacity adequacy in the PJM control area. Enron argues that the RAA will provide the appropriate operative backstop for capacity adequacy, not an individual utility such as PSE&G that would purport to be the self-anointed "guardian" of reliability within its service territory. (Enron IRB at 77-83).

PP&L asserts that the rationale for PSE&G's energy-only proposals, that it must supply capacity to protect system reliability, is fallacious. PP&L argues that in addressing PSE&G's refusal to give a capacity credit based on PSE&G's reliability rationale, the Board should consider and give weight to the proposals of the other LDCS, which are not limited to an energy-only format. (PP&L IRB at 17-23).

MAPSA asserts that PSE&G's energy-only proposal will harm reliability in the long term because the proposal creates a significant barrier to entry into the generation market. MAPSA points out that barrier to entry arises by inhibiting potential sellers from selling what most-consumers want to buy, both energy and capacity. MAPSA further argues that the energy-only limitation, by excluding capacity as a competitive product, would limit the value of new power plants, resulting in fewer new power plants from being built, thereby harming long term reliability. (MAPSA IRB at 23).

NJBUS also asserts that the PSE&G proposal to defer capacity competition is not justified by its concerns about reliability. NJBUS points out that, although all New Jersey

electric utilities are concerned about reliability, no other utility supports the prohibition on capacity competition inherent in PSE&G's proposal. (NJBUS IRB at 27-28).

IEPNJ argues that the structure and foundation of the PJM completely obviates PSE&G's position that it will maintain the responsibility for reliability and customers' capacity requirements. IEPNJ points out that PJM has, and will assure reliability of supply to customers, through requirements which will be imposed equally on all suppliers, both utility and non-utility. As such, IEPNJ asserts that PSE&G need not be the monopoly provider of capacity services. (IEPNJ IRB at 5-6).

Staff concurs with PSE&G's observation that the RAA is as yet untested, at least , with respect to the retail marketplace. However, Staff notes that the RAA is hardly a radical or new concept, and will serve as a conservative mechanism for PJM to provide for supply adequacy as the retail marketplace is opened to competitive markets. Staff maintains that the RAA mechanism that is and will be in place provides sufficient assurance to conclude that there is no reliability-driven basis for maintaining PSE&G as a monopoly supplier of retail capacity service in its service territory. Staff recommends that the Board should require all load serving entities ("LSEs") serving retail load in PSE&G's territory and throughout the State to adhere to all RAA and other PJM reliability criteria as a condition of doing business in the State. Staff also recommends that the Board should closely monitor the implementation of the RAA as the retail markets open up, to assure that reliability, in fact, is not compromised. (Staff IRB at 43-56).

2. Capacity Market

PSE&G indicates that it will not offer a capacity credit to its customers choosing a third-party supplier, until a liquid capacity market that provides a visible price for capacity is established within PJM. PSE&G points out that an actual, not estimated or assumed market capacity price is required

because in the absence of a visible and liquid market for capacity, an administrative credit is certain to be wrong on a consistent basis. (PSE&G IRB at 46-55).

The RPA asserts that the rationale for PSE&G refusing to allow its customers to shop for capacity is that it is waiting for a liquid and visible capacity market to emerge within PJM. The RPA points out that the rationale appears to be based on PSE&G's fear that it will not be able to sell its unneeded capacity once other suppliers begin providing PSE&G with customers with their own capacity. The RPA asserts that this rationale does not justify PSE&G's energy-only proposal. (RPA IRB at 37).

Enron indicates that notwithstanding PSE&G's suggestion to the contrary, a viable and visible capacity market presently exists within the PJM control area. Enron asserts that PSE&G's energy-only proposal would greatly inhibit the further development of the capacity market by significantly limiting participation of suppliers within the PSE&G territory, and argues that it should be rejected. (Enron IRB at 84-91).

PP&L submits that competition has been occurring in Pennsylvania, with parties buying and selling capacity in the bilateral market to meet their obligations within PJM. PP&L asserts that, all in all, there is a vibrant market that is quite liquid and pricing is known to the capacity market participants. (PP&L IRB at 17-24)

MAPSA indicates that the record in this proceeding is replete with evidence that there is an active bilateral capacity market, that capacity is regularly bought and sold and that despite the confidentiality of the marketplace, utilities, other participants and regulators can and do obtain information necessary to make pricing decisions. Furthermore, MAPSA asserts that there is no need to know the price of capacity for everyone, only PSE&G's price for capacity for its regulated BGS service. MAPSA therefore points out that there is no basis for PSE&G's contention that open published rates for

capacity are a prerequisite for competition. (MAPSA IRB at 23-24).

NJBUS also argues that a liquid and visible or transparent wholesale capacity price is not a prerequisite to competition. While a transparent price may be useful in the competitive market's, the market itself will accomplish that goal. NJBUS feels the proposal by PSE&G is solely a market strategy, having nothing whatsoever to do with the public interest. (NJBUS IRB at 30-32).

NJCU also argues that PSE&G's arguments on this issue are without merit. NJCU disagrees with the notion that a liquid and visible capacity market will exist only when the PJM/ISO post prices and quantities for capacity products. NJCU points out that capacity products are currently bought and sold each day in the wholesale market. (NJCU IRB at 9-16).

Staff asserts that the capacity credit can be determined based on relevant market information. Staff points out that the other LDCs have proposed in varying ways to procure both energy and capacity for their BGS rate, which will be transparent to the Board, and should reflect the competitive market price for capacity. Staff further asserts that these capacity prices can act as market indices when setting the capacity credit while the PJM capacity market takes hold and develops. Staff asserts that this method will, in the short run, give customers the ability to have sufficient information to comparison shop, while a liquid and visible capacity market develops. (Staff IRB at 56-63).

V. SETTLEMENT PROPOSALS

As noted above, by Order dated February 11, 1999, the Board, noting the enactment of the Electric Discount and Energy Competition Act on February 9, 1999, adopted a preliminary schedule to render decisions in the pending PSE&G and other three electric public utility restructuring related proceedings, consistent with the requirements of and the timetables required by the Act. In so doing, the Board

encouraged the parties in each of the respective proceedings to attempt to negotiate a settlement of the outstanding issues, in the unbundling, stranded costs and restructuring proceedings. The Board established a preliminary deadline of March 3, 1999, for the submission of any negotiated settlement in the PSE&G dockets, in advance of an anticipated March 31, 1999 date for deciding the PSE&G matters. The parties commenced settlement discussions and, at the request of Staff, the deadline for the submission of any negotiated settlement was subsequently extended.

A. Stipulation Filed by PSE&G and Other Parties

On March 17, 1999, a Stipulation ("Stipulation") was filed by PSE&G on behalf Of eight parties to the proceedings, including PSE&G, NRDC, NJCU, IBEW Local 94, New Jersey Transit, Enron, Tosco and IEPNJ ("the stipulating parties"), representing 2 proposed resolution by these parties of the issues in the stranded cost and rate unbundling proceedings and all of the non-generic restructuring proceeding issues included by the Board in its February 11, 1999 Order encouraging the settlement process. The key substantive elements of the Stipulation are summarized hereinbelow.

1. The stipulating parties have agreed that the following rate reductions should be implemented, consistent with subsection 4(d) of the Act, N.J.S.A. 48:3-52(d):

a) A 5% reduction from current rates, for service rendered on and after August 1, 1999. This reduction includes a 1% reduction relating to the savings from securitization.

b) An estimated reduction of an additional 2% from current rates for service rendered on or after January 1, 2000, subject to the prior receipt of a Bondable Transition Cost Rate Order establishing a securitization bond charge and providing for the securitization of $2.475 billion of generation related stranded costs, and the recovery of related taxes, issuance costs and

transaction costs. The level of rate reduction provided to customers will reflect the actual savings from the issuance of the bonds, less the 1% savings already provided to customers as of August 1, 1999, and the actual date of the rate reduction will be the same date that the securitization bond charge is established. This rate reduction and all subsequent rate reductions as set forth below are contingent upon the implementation of the securitization bond charge.

c) A further rate reduction for service rendered on and after August 1, 2001 to bring the total rate reduction to 8.25% from current rates.

d) A final rate reduction for service rendered on and after August 1, 2002 which will result in each customer class receiving a rate reduction of 10% relative to the rates in effect as of April 30, 1997.

e) All rate reductions will be applied to customers' bills pursuant to the rate design set forth in Attachment 2 to the Stipulation.

(f) The final rate reduction will be sustained until July 31, 2003.

2. There shall be a four year transition period commencing on August 1, 1999 and terminating on July 31, 2003 ("Transition Period").

3. Unbundled rates for each rate class have been developed using the Company's 1995 cost of service study, using the parameters defined in Attachment 2 to the Stipulation. Each customers bill shall indicate the dollar savings resulting from the rate reductions.

4. An excess depreciation reserve in the amount of $568.7 million is to be amortized over three years and seven months, beginning on January 1, 2000 and ending on July 31, 2003, under the following schedule: $125 million each in 2000 and 2001, $135 million in 2002, and $183.7 million in 2003.

5. Consistent with subsection 12 of the Act, N.J.S.A. 48:3-60, PSE&G will establish a Societal Benefits Charge Clause, which will include costs for social programs (including a universal service fund), nuclear decommissioning costs, demand side management costs, manufactured gas plant remediation costs and consumer education costs.

6. The SBC will be set at the level of costs included in rates as of February 9, 1999, the effective date of the Act, and will remain constant at that level through the Transition Period. The difference between actual costs incurred during the Transition Period, and the level of costs reflected in the SBC will be subject to deferred accounting. Interest on any under/overrecovery will be computed at a seven-year single A debt rate. At the completion of the Transition Period the SBC will be reset and then reset annually thereafter.

7. DSM generation-related lost revenue created subsequent to August 1, 1999 will no longer be reflected in the calculation of costs eligible for DSM cost recovery.

8. PSE&G's unbundled rates will include a non-utility generation market transition charge ("NTC") to recover above-market stranded costs of existing NUG contracts. The contracts will remain the obligation of PSE&G during their lives. PSE&G will sell the energy and capacity from these contracts at wholesale PJM locational marginal prices and at wholesale, respectively.

9. The initial level of the NTC will be set to recover $183 million of above-market NUG costs (based upon Exhibit PS-20, Schedule CJL-F3 and more fully defined in Attachment 2). This level will remain constant for four years from August 1, 1999. The difference between this collection level and the actual above-market NUG costs during the Transition Period will be subject to deferred accounting. Interest at the seven year single A debt rate will be Calculated on over/underrecoveries. After the Transition Period, the NTC will be reset annually. Board-approved NUG contract buyout

and buy down costs will be reflected in the NTC, consistent with subsection 13(l)(3) of the Act, N.J.S.A. 48:3-61(l)(3).

10. While PSE&G maintains that its generation assets stranded cost valuation of $3.873 billion is supported by the record, the stipulating parties, including PSE&G, have agreed that the Company is entitled to recover $3.30 billion of its generation-related stranded costs resulting from a market valuation of $0.046 billion and $1.722 billion for nuclear and fossil generating assets, respectively. The stipulating parties have agreed to a total reduction of $225 million in unsecuritized stranded costs including: (1) to reflect the estimated Levelized Energy Adjustment Clause overrecovery as of July 31, 1999 ($60 million after-tax); and (2) a reduction of $90 million of Salem stranded costs. The stipulating parties have agreed that the Company will be provided an opportunity to recover up to $3.075 billion of generation related stranded costs, through securitization of $2.475 billion and an opportunity to recover up to $600 million of unsecuritized generation related stranded costs on a net present value basis. G72

11. With respect to securitization, the stipulating parties have agreed that: (1) consistent with section 14 of the Act, N.J.S.A. 48:3-62, PSE&G will utilize the net proceeds of securitization to refinance or retire its debt and/or equity; (ii) that such refinancing and/or retirement of such debt may occur as a result of mandatory and/or optional redemption, repurchase and/or tender, which may be at a premium; and (iii) the Board should authorize PSE&G to employ such methods as are reasonable and necessary to achieve the overall intent and purposes of the Act.

a) The stipulating parties have further agreed that the Board should issue a financing order authorizing PSE&G to issue up to $2.6 billion of transition bonds, representing $2.475 billion of stranded costs and an estimated $125 million of transaction costs. The stipulating parties, other than the NJCU, have agreed that all taxes related to securitization will be separately stated

on the tariff and will be recovered through Board-approved transition bond charges. The NJCU has reserved its right to comment on this tax issue.

12. PSE&G has requested (and the stipulating parties do not object) that the Board issue a number of findings pursuant to section 14 of the Act, N.J.S.A. 48:3-62, in connection with its review of PSE&G's stranded costs filing, including that:

a) PSE&G has taken reasonable measures to date on mitigation of stranded costs (Exhibit PS-14) and the terms of the Stipulation, including rate reductions, rate freezes, and other mitigation measures will create appropriate incentives in place to mitigate the total amount of its stranded costs;

b) PSE&G will not be able to achieve the level of rate reduction deemed by the Board to be necessary and appropriate pursuant to the provisions of sections 4 and 13 of the Act, N.J.S.A. 48:3-52 and 61, absent the issuance of transition bonds; and

c) The issuance of such bonds will provide tangible and quantifiable benefits to ratepayers, including greater rate reductions than would have been achieved absent the issuance of such bonds and net present value savings over the term of the bonds.

13. The stipulating parties have agreed that PSE&G should be provided the opportunity to recover up to $600 million of its unsecuritized stranded costs on a net of tax, net present value basis, calculated at a 8.42% discount rate, over the Transition Period. This recovery is to be accomplished via a 2 mill per kwh retail adder, an explicit Market Transition Charge, exclusive of the NTC, and the amount funded by the excess depreciation reserve amortization. The stipulating parties recognize that as BGS customers leave PSE&G for third party suppliers, full recovery of these costs is not assured and represents a risk of undercollection to PSE&G.

14. At the end of the Transition Period, the recovery of the $600 million will be reconciled to actual collections based on actual sales, the net present value of the recovery from the MTC (exclusive of the NTC). collections from the 2.0 mill per kwh adder for all customers retained on BGS, the depreciation amortization, and any payments to PSE&G resulting from BGS bidding in year four of the Transition Period. PSE&G will be at risk for any shortfall. In the event the Company collects over $600 million, such overrecovery will be used to reduce the SBC at the end of the Transition Period when the SBC is reset.

15. The Company's shopping credit shall equal its BGS rate, which shall be inclusive of an allowance for the cost of energy, capacity, transmission, ancillary services, losses, taxes and retail adder. The shopping credit levels should be established and fixed for the duration of the transition period without adjustment or true up of any kind. The stipulating parties have agreed to the following shopping credits:

	1999	2000	2001	2002	2003
RS	5.71	5.86	5.86	5.86	5.86
GLP	5.30	5.35	5.39	5.44	5.44
LPL-S	4.84	4.88	4.93	4.97	4.97
LPL-P	4.54	4.58	4.62	4.66	4.66
HTS-SubT	4.30	4.35	4.40	4.44	4.44
HTS-HV	4.. ?	4.16	4.21	4.25	4.25
Overall	**4.95**	**5.03**	**5.06**	**5.10**	**5.10**

Additional shopping-related savings, resulting from customers receiving electric generation service from a supplier at a price less than the applicable rate schedule shopping credit, are above and beyond the rate reductions set forth in paragraph 1 of the Stipulation.

16. The stipulating parties have agreed that the stipulated BGS rates/shopping credits meet the shopping credit

definition in the Act and resolve the issue of BGS pricing and the shopping credit in a manner that satisfies the requirements of subsections 9(a) and 9(d) of the Act, N.J.S.A. 48:3-57(a) and (d).

17. Under the Act, PSE&G has a three year obligation to provide BGS through July 31, 2002. The stipulating parties support the bidding out of the BGS to be provided after July 31, 2002. The first year bid will be a pre-payment method based upon the pre-established shopping credit for year four. If the bid results in a payment to PSE&G, it will be considered as a part of the MTC. If the bid requires a payment by PSE&G, such payment will be subject to deferral and subsequent recovery with interest at a seven year single A debt rate. PSE&G's unregulated affiliate will be authorized to bid for such BGS to be provided after July 31, 2002, pursuant to Board-approved procedures.

18. PSE&G has agreed not to promote its BGS as a competitive alternative.

19. The stipulating parties will not object to the Board approving the transfer of the Company's electric generation-related assets and their operation, as identified in Attachment 3 to the Stipulation, and all associated rights and liabilities, into a separate corporate entity or entities ("Genco") to be owned by Public Service Enterprise Group Inc. and not by PSE&G.

20. The stipulating parties have agreed that the final and fixed transfer value, pursuant to subsections 7(d) and 13(e) of the Act, N.J.S.A. 48:3-55(d) and 61(e), for the generation facilities to be transferred is $2.368 billion, which is the fair market value of the transferred assets. In addition, PSE&G will transfer other generation-related assets including materials, supplies and fuel, at book value. PSE&G will not retain any liabilities associated with the transferred generation facilities. No land held for future use (Account 105) will be transferred to Genco. All generation related expenses and

capital expenditures related to generation will be borne by Genco.

21. The BGS contract between PSE&G and Genco will contain the following provisions:

a) The transfer to Genco shall be accompanied by Genco and PSE&G entering into a BGS contract whereby Genco would provide full requirements service for energy, capacity, losses and ancillary services needed by PSE&G for BGS and Off-Tariff Rate Agreement ("OTRA") customers.

b) The BGS contract shall provide that the consideration paid by PSE&G for such full requirements service shall be (i) an amount equal to the full amount charged for BGS to PSE&G's retail electric customers (less sales and use tax and transmission); (ii) an amount equal to PSE&G's retail delivery to OTRA customers, multiplied by the comparable BGS rate for such customers as set forth in paragraph 15 (less sales and use tax and transmission); and (iii) an additional charge for price stability services provided by the combustion turbine assets of Genco, payable based on the installed capacity of those assets, equal to the full actual amount collected pursuant to paragraph 13 of the Stipulation, excluding the 2.0 mill per kwh retail adder. Pursuant to subsection 9(b)(3) of the Act, N.J.S.A. 48:3-57(b)(3), no net revenue from this contract may be used to reduce the MTC or distribution rates.

c) The BGS contract shall also provide that PSE&G will transfer to Genco the authority to act as its agent for the purpose of scheduling, electing and/or using all rights, including Fixed Transmission Rights, associated with transmission delivery of full requirements service for PSE&G's customers.

d) The BGS contract shall be filed with the Board.

22. For the term of the BGS contract, PSE&G will continue to supply, on an as needed basis, dedicated intrastate natural gas transportation services for Genco's own gas supplies from PSE&G's city gate to the transferred generating facilities, under current Board-approved rates, terms and conditions.

23. During the Transition Period, the transferred generating facilities may only be sold or transferred by Genco to any other party if the other party agrees to enter into a comparable BGS contract with the same considerations, including the right to recover the MTC allocated to such generating facilities. If a sale of the transferred generating facilities occurs within the Transition Period, any net after-tax gains from such sales will be shared equally between shareholders and customers, in a manner to be determined by the Board.

24. The Company requests, and the stipulating parties do not object to, certain specified findings by the Board with regard to the transfer of the generating assets in accordance with the designation of such facilities as Exempt Wholesale Generators ("EWG") under section 32(c) of the Public Utility Holding Company Act of 1935 ("PUHCA"). In addition, the stipulating parties agree that Genco, as an EWG, will not offer retail electric service.

25. PSE&G requests, and the stipulating parties do not object to, the Board finding that in accordance with section 32(k) of the PUHCA, the Board has sufficient regulatory authority, resources and access to books and records of PSE&G and any relevant associate, affiliate or subsidiary company, to ensure that the BGS contract with: (a) benefit consumers; (b) not violate any State law; (c) not provide the Genco any unfair competitive advantage by virtue of its affiliation or association with the Company; and (d) is in the public interest.

26. PSE&G shall submit, within 60 days of the Board's written approval of the Stipulation, a tentative schedule for the receipt of necessary authorization for the transfer from other agencies. Within 60 days of such approval, PSE&G

shall file with the Board copies of any documents evidencing the transfer and related assumption of liabilities. Upon receipt of approval from other agencies, PSE&G will provide a filing which reflects the terms of such approvals and accounting implemented.

27. The stipulating parties have agreed that the Board should order that all contracts (except NUG contracts) associated with the electric generating business be transferred to Genco from PSE&G simultaneously with the transfer of the generating assets, along with all rights and obligations in connection therewith.

28. The stipulating parties recognize that various federal and state approvals and third party consents will be necessary and will result in a delay between the date that the Board may approve the Stipulation and the date the generating facilities are actually transferred to Genco. In order to maintain the intent of the Stipulation during this period of transfer and to effectuate the purposes of the Act under subsection 9(b)(3), N.J.S.A. 48:3-57(b)(3), the stipulating parties have agreed that provisions of section 7 of the Act, N.J.S.A. 48:3-55 which require a payment of a percentage of net revenues for the sharing of common assets and personnel is inapplicable.

29. Generating capacity transferred to Genco will be maintained as a capacity resource within PJM for the Transition Period. During that period, Genco may sell said capacity outside of the PJM system for periods of less than one year after it makes a good faith effort to sell the capacity into the PJM system at market rates.

30. The stipulating parties, other than Enron, have agreed that in addition to any other affiliate standards of conduct that might apply to PSE&G, the following shall apply until the expiration of the MTC or until appropriate and applicable safeguards or code of conduct are adopted by the FERC:

> Neither [PSE&G nor any related business segment of Public Service Enterprise Group selling electric power at retail in New Jersey] shall receive from Genco an

> unreasonable preference over a non-affiliated retail electric supplier ("RES") that is not comparable to that afforded a nonaffiliated RES in the purchase, sale, use or conveyance of goods and services. This provision shall not apply to the BGS Wholesale Supply Agreement entered into between Genco and [PSE&G] and approved by the Board.

30A. Enron contends that the affiliate Standard of Conduct that should apply is as follows:

> Genco shall not offer power or other services to any of its affiliates which are not made generally available to non-affiliated companies, nor shall it offer such power or other services to affiliates at prices more favorable than those generally available in the competitive marketplace and/or to those offered to non-affiliated companies. This provision shall not apply to the BGS Wholesale Supply Agreement entered into between Genco and [PSE&G] and approved by the Board.

31. PSE&G requests, and the stipulating parties do not object to, a finding by the Board, pursuant to N.J.S.A. 48:3-7, that the transfer of generating facilities to Genco is in the public interest, will not jeopardize system reliability, and will not adversely impact PSE&G's ability to meet its pension obligations to its employees.

32. The Company requests, and the stipulating parties do not object to, a finding by the Board that, because of the extensive nature of the record regarding valuation of the assets being transferred, the requirements of N.J.A.C. 14:1-5.6 should be waived.

33. Upon the transfer of the nuclear generation assets, neither PSE&G or its retail customers shall be responsible to decommission its previously owned nuclear units, subject to Nuclear Regulatory Commission ("NRC") approval. That responsibility will pass to Genco with the transfer of the nuclear generation and associated assets described in

Attachment 3 to the Stipulation and the Decommissioning Trust Funds.

34. The stipulating parties have agreed that the proposed Third Party Supplier Master Service Agreement and associated electric tariff modifications filed by PSE&G on February 1, 1999 should be approved subject to: (1) conformance with the balance of the Stipulation; (2) conformance with the Act; (3) changes resulting from the resolution of restructuring issues; and (4) changes as a result of the Third Party Supplier Master Service Agreement resolution. These changes will be included in a completely new tariff which will be filed with the Board after approval of the Stipulation and resolution of other restructuring issues.

35. The stipulating parties agree with Staff s recommendation that the Board work cooperatively with the PJM-ISO to monitor actual market behavior in connection with the FERC's ordered market monitoring plan.

36. The stipulating parties have agreed to work cooperatively to conclude the billing and metering proceeding in an expedited fashion, which proceeding the parties request that the Board conclude by May 1, 2000.

B. <u>Alternative Stipulation Filed by the RPA and Other Parties</u>

By letter dated March 29, 1999, the Ratepayer Advocate submitted an alternative Stipulation of Settlement to the Board for its consideration on behalf of a number of parties to the proceedings, including the RPA, MAPSA, NJBUS, NJICG, NJPII (excluding the NRDC), and NEV. The RPA indicates in its letter that, while it had sought in good faith to negotiate issues related to the proceedings with PSE&G over the previous month, an agreement could not be reached. The RPA urges the Board to reject the Stipulation sponsored by PSE&G and certain other parties and instead adopt its proposed alternative Stipulation of Settlement ("Stipulation II) accompanying its March 29, 1999 letter, which it asserts represents an alternative compromise to resolve the issues in

these cases which will safeguard rate discounts into the future, provide greater selections and savings in the electricity market to jump start competition, and give PSE&G a substantial opportunity to recover the same amount of stranded costs with the same level of securitization proposed in its own plan.

The key elements of Stipulation II are summarized below:

(a) Stipulation II proposes that PSE&G be ordered to reduce its overall rates, cumulatively, by the following amounts, pursuant to the following schedule:

August 1, 1999	5.0% from current rates;
January 1, 2000	7.0% from current rates (assuming a 3% reduction from securitization, any additional reductions over 3% would be passed through to ratepayers);
August 1, 2001	8.25% from current rates; and
August 1, 2002	13.9% from current rates

Contrary to the PSE&G Stipulation, these rate reductions would not be contingent on securitization, but reflect guaranteed minimums. Savings from securitization would be passed on as further rate reductions.

(b) Under PSE&G's proposal, the rate decreases in years one to four would be reflected in a separate transition rate credit or negative MTC, which would be eliminated in year five. To avoid the asserted rate shock in year five attendant to PSE&G's proposed Stipulation, Stipulation II proposes that the following cost reductions be applied as offsets to the rate increases:

(1) Approximately 60% of the $569 million excess depreciation reserve should be applied to offset the rate increases in years five and six;

(2) The value of expired amortizations still in rates ($35 million) should be applied to offset rate increases;

(3) $90 million of Salem related stranded costs as reflected in the PSE&G Stipulation should be applied to further offset rate increases;

(4) The $90 million (after tax) overcollection in the LEAC as of July 31, 1999 should be applied to further offset rate increases.

The parties to Stipulation II assert that failure to recognize such cost reductions would result in PSE&G's rates being overstated by approximately $900 million (grossed up for taxes), which would allegedly occur under PSE&G's proposed Stipulation. Stipulation II proposes to use a portion of PSE&G's rate credits to eliminate rate increases that would otherwise occur after the 48 month Transition Period. In addition, Stipulation II suggests that rates should stay at the reduced levels in year seven and thereafter unless PSE&G proves the need for a higher rates in a rate proceeding.

(c) Stipulation II proposes that the rate decreases be allocated to reflect the impact of the 1998 Demand Side Adjustment Factor ("DSAF") increase. Transition bond charges would be grossed up and collected via a per kwh charge to reflect the manner in which the revenue requirement associated with generating assets is currently being collected in rates, These elements are asserted to be consistent with the PSE&G Stipulation and would ensure that all customers receive the same rate reductions among and between rate classes.

(d) Stipulation II proposes that distribution rates be reduced by $20 million to reflect the current risk adjusted cost of capital, which reduces the average distribution rate from 2.08 cents to 2.03 cents per kwh. This is consistent with PSE&G's proposed Stipulation.

(e) Stipulation II proposes that stranded cost recovery be as follows:

Total Stranded Costs	$3.30 billion
Securitized Amount (including issuance costs)	$2.54 billion
Contribution from Retail Adder	$54.6 million
Distribution Depreciation Amortization	$170.35 million
Genco Transfer Premium	$600 million
Non-Credited Cost Reductions	$3 million
Mitigation Opportunities	$828 million
Total	**$4.23 billion**

While the stated level of stranded costs is identical to the amount in PSE&G's proposed Stipulation, Stipulation II would require PSE&G to fund the unsecuritized portion of this amount through recognition of the actual value of the transfer of the Company's generation assets and other related assets to an unregulated affiliate as well as through mitigation cost savings and non-credited cost reductions.

Genco Transfer Value

Stipulation II would reduce PSE&G's MTC to zero. In this manner, it is asserted that ratepayers will actually receive the $600 million premium for the assets transferred. By contrast, while PSE&G's proposed Stipulation appears to acknowledge that the fair market value of the assets transferred to Genco is $600 million greater than the nominal net book value less assumed stranded costs, it recognizes this higher value, not by an offset to stranded costs, but rather, through a string of MTC payments to be made by ratepayers and from foregone future rate reductions.

Other Sources of Stranded Cost Funding

In addition to the $600 million market value adjustment described above, Stipulation II identifies the following other sources of recovery- opportunity for nonsecuritized stranded costs:

(1) Distribution depreciation reserve amortization: In contrast to the PSE&G Stipulation, under which PSE&G would retain the entire excess depreciation balance (estimated by PSE&G to be $569 million), to be applied towards its opportunity to recover non-securitized stranded costs, Stipulation II would permit the Company to retain approximately 40% of the net present value of the amortization as a contribution to stranded costs.

(2) Retail adder: Stipulation II recognizes that a contribution to stranded costs is made by customers who do not shop but rather remain with the Company for BGS. For such customers, the retail adder in their shopping credit also remains with PSE&G. Based upon a levelized retail adder of 7.3 mills per kwh, Stipulation II identifies an additional contribution of $54.64 million contribution to stranded costs by non-shoppers.

3) Non-Credited Cost Reductions: Stipulation II would permit PSE&G to retain over $40 million in expired amortizations and other cost reductions. which might otherwise be passed to ratepayers via rate reductions.

(4) Mitigation opportunities: Stipulation II assumes over $800 million in future cost mitigation opportunities for PSE&G, based upon the mid-range of mitigation cost savings estimates identified by the Auditors.

In total, Stipulation II assertedly would provide PSE&G the opportunity to recover over $2.8 billion for stranded costs, without even considering the Genco transfer premium or mitigation savings opportunities.

(f) Under Stipulation II, BGS would be bid out on a "prepayment basis" in year three, to be effective in year four, and would be rebid annually thereafter.

(g) Stipulation II accepts the proposed generation asset transfer envisioned in PSE&G's proposed Stipulation, subject to the following conditions:

(1) The assignment of a $600 million transfer premium or market value adder to benefit ratepayers;

(2) The establishment of detailed Affiliate Relations rules;

(3) The initiation of a Genco Code of Conduct for PSE&G, including a requirement that PSE&G or its affiliated supplier would not receive an unreasonable preference over non-affiliated suppliers. Excess power generation should be sold to the highest bidder through an accessible bulletin board-type system.

(4) Generating capacity transferred to Genco would be maintained as a capacity resource within PJM for the first four years; and

(5) Consistent with the Act, the submission of a detailed plan and proposal for the transfer.

(h) Stipulation II proposes to offer higher customer shopping credits than PSE&G's proposed Stipulation. Specifically, Stipulation II proposes the following shopping credits, inclusive of transmission:

1999	4.95 cents per kwh;
2000	5.40 cents per kwh;
2001	5.40 cents per kwh;
2002	5.40 cents per kwh;
2003	5.40 cents per kwh.

The 5.40 cent per kwh system average shopping credit is proposed to be distributed as follows:

RS	6.28 cents per kwh;
GLP	5.50 cents per kwh;
LPL-S	5.00 cents per kwh;
LPL-P	4.80 cents per kwh,,
HTS-SubT	4.50 cents per kwh:

HTS-HV 4.16 cents per kwh.

Stipulation II recommends that the Board establish a special incentive customer shopping credit for RS and GLP customers located in Urban Enterprise Zones, and proposes the following additional conditions:

(1) Actual customer shopping credits should be calculated on a rate class basis as the residual after all other unbundled elements are calculated so long as the results do not produce credits that are lower than those proposed hereinabove;

(2) The shopping credits should be allocated between demand and energy for all schedules with separate demand charges;

(3) If PSE&G's transmission charges increase during the transition period, shopping credits should be increased accordingly.

The parties to Stipulation II assert that PSE&G's proposed Stipulation provides shopping credits which are inadequate to allow robust competition, particularly in the residential market. These parties further assert that the shopping credits provided in PSE&G's proposed Stipulation are significantly below the shopping credits established in Pennsylvania in the PECO Energy ("PECO") service territory, when those shopping credits are updated for New Jersey-specific costs and increases in the wholesale market. While the PECO shopping credits have been described as reflecting a level that is necessary to make robust competition possible for all customer classes, the parties to Stipulation II assert that "blindly" applying the PECO credits to other jurisdictions without updating them for jurisdictional cost differences and changes in market conditions "makes little sense." (Stipulation II at 25). Attachment D to Stipulation II contains an affidavit by John Rohrbach, on behalf of MAPSA, explaining the market factors to be considered when updating the PECO Shopping Credit for application in New Jersey. It is asserted that aggregate transmission costs, congestion costs

and tax rate differentials between New Jersey and Pennsylvania amount to 0.11 cents per kwh on average, and 0.24 cents per kwh for serving residential customers. (Stipulation II at 26). In addition, it is asserted that since the PECO case, there have been long term increases in wholesale forward energy and capacity market costs amounting to 0.495 cents per kwh on average, and 0.561 cents per kwh for residential customers, and that these increases will be present "at least for the next several years." Id.

(k)[6] Stipulation II incorporates the PSE&G Stipulation's proposal with respect to the Societal Benefits Charge.

(l) Stipulation II incorporates the PSE&G Stipulation's proposal with respect to non-utility generation issue, with the proviso that PSE&G must seek to maximize value from NUG contracts by selling all portions of the contract at the market clearing price.

(m) Stipulation II lists several additional terms which should be adopted at the same time the other issues in these proceedings are decided, including:

> 1. Third Party Supplier Agreement and Retail Tariff issues must be satisfactorily resolved, including the establishment of the Agreement as a supplier tariff; customers should be permitted to change suppliers at will without incurring large "switching" fees, and not be locked in for a minimum of one year as proposed in the PSE&G Stipulation;
>
> 2. Necessary Electronic Date Interchange ("EDI") protocols and procedures should be established via a collaborative process; certification of third party suppliers' and PSE&G's EDI systems as being compliant

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[6] We have followed the enumeration set forth in Stipulation II, which does not include a provision "(i)" or "(j)".

with EDI protocols and Board standards should be done by an independent third party, and not PSE&G;

3. PSE&G may continue to serve existing Off-Tariff Rate Agreements consistent with the provisions of the Act;

4. The Board will begin proceedings as soon as possible to establish rules for unbundling and competitive provision of metering and billing at the earliest possible date, but no later than January 1, 2000. In the interim, third party suppliers should be permitted to bill for their own services.

(n) To facilitate successful municipal aggregation in PSE&G's service territory, Stipulation II finds the following provisions to be appropriate:

1. Within two weeks of receipt of a customer's request, PSE&G shall provide the usage data or load profiles for the past twelve months to the customer making the request, at no charge to the customer;

2. PSE&G shall provide area based aggregate load profiles by municipal boundaries and rate class upon request by a government aggregator and shall also provide the government aggregator, free of charge a list of addresses (excluding names) of all energy customers who receive services within the boundaries of the town or municipality; and

3. PSE&G shall maintain and disseminate a Board approved list of licensed third party suppliers to its customers free of charge twice a year.

VI. COMMENTS ON THE SETTLEMENT PROPOSALS

Upon receipt of the Stipulation and Stipulation II, the Board established a comment period to allow interested parties to submit comments to the Board with respect to both proposals. The parties were advised via letters from the Board's Secretary that comments with respect to the two

proposed settlements were to be filed by April 5 and April 7, 1999, respectively. Comments were received from numerous parties, several participants, as well as several non-parties including: PSE&G, the Ratepayer Advocate, MAPSA, NJBUS, NJPII (except for NRDC), NEV, NJICG, NJCA, IEPNJ, Tosco, Enron, NJCU, PP&L Energy Plus ("PP&L"), Co-Steel, CFC, RECO, National Energy Marketers Association ("NEMA") and Exelon Energy. Letters generally supporting the PSE&G Stipulation were also received from the Commerce and Industry Association of New Jersey and the New Jersey Business and Industry Association. Key elements of the comments are summarized hereinbelow.

A. Comments on the PSE&G Stipulation

1. PSE&G

PSE&G, a signatory party to the Stipulation, indicates that the Stipulation contains mutually balancing and interdependent provisions and reflects compromises reached among all the signatories after consideration of the record evidence. PSE&G asserts that the Stipulation is reasonable and in the public interest, is fully supported by the record, is wholly consistent and in compliance with the Act, and should be adopted by the Board. PSE&G asserts that, in contrast to other jurisdictions undertaking electric industry restructuring, where either rate reductions or a shopping credit were awarded, the Stipulation provides both generous rate reductions and large shopping credits which are among the latest awarded anywhere in the nation to date, and which include a retail adder. PSE&G asserts that any larger rate reductions or shopping credits would be unreasonable and would jeopardize PSE&G's financial viability, its workers' jobs, and would impact quality of service. PSE&G indicates that it has agreed in the Stipulation to forego the opportunity to recover over three quarters of a billion dollars of stranded costs compared to its original request for $3.9 billion, and to significantly shorten the recovery period from seven to four years. Moreover, the proposed transfer of generating assets addresses concerns raised by customers, suppliers and

cogenerators during the proceeding regarding the ability of the utility to favor its own generation in the retail markets.

PSE&G notes that the Board has long relied on stipulations to assist it in resolving issues before it and that the Courts have upheld that reliance, recognizing that the parties themselves are often in the best position to determine a reasonable outcome in view of their familiarity with the issues and the evidence. I/M/0 Petition of PSE&G, 304 N.J. Super 247, 266-267 (App. Div. 1997) Cert. Den., 152 N.J. 12 (1997). PSE&G asserts that in the above cited case the Court upheld reliance by the Board on a stipulation executed by less than all the parties to a case, calling stipulations "fact-finding tools" and concluding that "so long as the Board independently examines the existing record and expressly finds that the stipulated figures yield rates that satisfy the statutory standard, the Board may adopt the stipulations," Id. at 268, 270.

PSE&G asserts that the rate reductions provided in the Stipulation are consistent with the requirements of the Act, will produce approximately $1.5 billion in customer savings over the four year transition period, and are among the largest restructuring rate reductions reported in cases throughout the country. PSE&G notes that during the proceeding the Company proposed a 6.7% rate reduction, the Auditors proposed reductions ranging from 8.58% to 12.01%, the NJBUS and NJICG recommended a 10% rate reduction which would grow to 12% the following year, NJBUS and NJCU recommended a rate reduction of "at least" 10% and the RPA recommended a reduction of 15% without the Company's depreciation proposal and a 19% reduction with the depreciation adjustment Based upon this record, the ALJ recommended a 10% to 12% range for the rate reduction. PSE&G argues that the stipulated rate reductions, reaching 13.9% during the last year of the transition period, are clearly in line with the record and the majority of recommendations in the case, and comport with the requirements of the Act.

PSE&G asserts that paragraph 3 of the Stipulation and Attachment 2 therein provide unbundled rates consistent with section 4 of the Act, N.J.S.A. 48:3-52, including a separate charge for BGS and a shopping credit, a separate transmission component of BGS based on the current PJM Open Access Tariff, discrete charges for customer services and distribution, assurances that there will be no reallocation of costs between or among customer classes, and a mechanism for showing the impact of the required rate reductions on the bill. PSE&G contends that the Stipulation's reliance on the 1995 cost of service study modified to accommodate updates and recommendations of the parties, is reasonable and consistent with the Act. PSE&G argues that the 1995 cost of service study was utilized by the Company from the start of the proceedings and the parties had ample opportunity to analyze and comment thereupon, and that the Act does not require use of the cost of service study from the last base rate case as argued by some parties. The signatory parties to the Stipulation have agreed to adjust the 1995 cost of service study to incorporate a $20 million decrease in distribution rates to reflect a more current cost of capital of 9.5%. Adjustments were also made to reflect changes in Post-Retirement Benefits other than Pension ("PBOP") accounting and energy tax law.

The Company asserts that the use of the amortization of the excess electric depreciation reserve is reasonable and consistent with its original proposal in this matter, and provides a source of funds to achieve the mandated rate reductions without jeopardizing the financial health of the Company. The SBC provided by the proposed Stipulation includes only those cost categories identified in section 12 of the Act, N.J.S.A. 48:3-60, consistent with the Act's sustained rate reduction requirements, and is capped at current recovery levels during the transition period, in contrast to PSE&G's original proposal that the SBC be exempt from the rate cap. PSE&G argues that the deferred accounting with interest will provide PSE&G the opportunity for-full recovery of these costs, which are not under the Company's control but are

dependent upon regulatory action by the Board or other State agencies. The NTC charge will permit recovery by PSE&G of contractually-incurred NUG costs, and will also provide a mechanism to reflect future buyouts or buydowns of NUG contracts, consistent with the provisions of section 13 of the Act, N.J.S.A. 48:3-61. Deferred accounting with interest will assure full recovery of these costs consistent with the Act and case law in New Jersey.

With regard to stranded cost levels, PSE&G asserts that the record demonstrates, and the ALJ concluded, that recovery of the majority of the Company's post-1992 rate case capital additions is justified, and asserts that the record demonstrates that the standards for such recovery as set forth in subsection 13(d) of the Act, N.J.S.A. 48:3-61(e), have been met. With regard to overall calculation methodology, the Company asserts that it used a modeling technique that was followed by all parties, as recognized by the ALJ, and that this methodology is fundamentally no different than the process a prospective buyer of the generating assets would go through. PSE&G argues that this technique satisfies the requirement in subsection 13(e) of the Act, N.J.S.A. 48:3-61(e), that the full market value of each asset over its remaining useful life be demonstrated. PSE&G asserts that this methodology is superior to a comparison to sales of generating assets by other utilities, as argued by Stipulation II's proponents, because such a comparative sales approach cannot reflect the vast differences between plants with respect to numerous factors, including heat rates, future capital additions, environmental regulations, energy prices, taxes, transferred or retained liabilities and pre-closing conditions. The record includes a range of owned generation stranded cost estimates using various versions of the Company's approach and different assumptions. The Company filed a quantification of $3.9 billion. The RPA recommended generation stranded cost's of $1.898 billion, but PSE&G asserts the record reflects that the RPA's actual position at the close of hearings was $2.308 billion. The Auditors quantified a range from a low of $2.485 billion, to a medium of $2.949

billion and a high of $3.310 billion, based on the ALJ's I.D. The stipulated level of eligible generation-related stranded costs of $3.3 billion, therefore, is asserted to be within the range of the parties' recommendations on the record. Moreover, PSE&G agreed via the Stipulation to forego recovery of $225 million of this eligible amount, thereby capping recovery at $3.075 billion.

The Company asserts that there are substantial grounds for Board approval of the level of securitization in the Stipulation pursuant to subsection 14(b) of the Act, N.J.S.A. 48:3-62(b), because the record demonstrates that the Company has taken reasonable mitigation measures, that it will not be able to achieve the necessary rate reductions absent securitization, and that the bonds will result in tangible and quantifiable benefits to ratepayers.[7] PSE&G also points to the Auditors' recommendation that the Company be allowed to securitize $2.4 billion of generation stranded costs. PSE&G asserts that in order to fully recover the bonded stranded costs of $2.475 billion, approximately $1.710 of state and federal income tax that are triggered by recovery of the bonded stranded costs must also be recovered, and that inclusion of the taxes in the nonrevocable bond charge, as provided in the Stipulation, provides assurance of such collection. PSE&G argues that this position is supported by the definition of "bondable stranded costs" in section 3 of the Act, N.J.S.A. 48:3-51, as well by subsection 15(a)(2) of the Act, N.J.S.A. 48:3-63(a)(2). PSE&G raises concerns with an alternative suggestion raised by the RPA and others that the taxes should be separately collected through the MTC, asserting that it is questionable whether the Act would permit a 15 year MTC to recover these tax expenses, with the only possible, but in its view still questionable, vehicle being subsection 13(l)(3) of the Act, N.J.S.A. 48:3-61(l)(3). It further argues that use of the MTC is not needed, since it

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[7] PSE&G's April 15, 1999 comments at page 31 list citations to the record which, it alleges, support this conclusion.

would be a simple matter to require a true-up of the bond charge of statutory tax rate changes occur. Thus, PSE&G maintains that use of an MTC rather than the bond charge would put PSE&G at risk for these taxes, is really not needed, and should not be implemented, and that the inclusion of taxes in the bond transition charges, as provided in the Stipulation, should be approved.

PSE&G asserts that the shopping credits in the Stipulation, which equal the BGS price, are consistent with the Act, particularly subsections 9(a), (c), and (e) thereof, N.J.S.A. 48:3-57 (a), (c) and (e), and are supported by the record. The BGS charge is required to be based on the cost of power purchased at prices consistent with market conditions in the competitive wholesale market, plus ancillary and administrative costs. The energy and capacity market price estimates testified to by Company witness Loxley, adjusted for losses and taxes and differentiated by rate schedule, time periods and load profiles and consideration of other cost estimate evidence in the record were used by the parties to the Stipulation as the basis for the BGS price/shopping credits. To this was added a retail adder of 2 mills per kwh to recognize related ancillary and administrative costs, consistent with section 9 of the Act, N.J.S.A. 48:3-57, and transmission costs equal to the PJM Open Access Tariff. During the proceeding, certain parties argued for a retail adder ranging up to 5 mills per kwh, while PSE&G and the Auditors took the position in testimony that no retail adder was appropriate since it could be viewed as providing windfall gains to marketers and shopping customers, to the disadvantage of non-shopping customers. Thus, PSE&G asserts, the 2 mill retail adder is within the range in the record. The Stipulation's shopping credits are higher than any other PSE&G is aware of based on reported decisions in other states.

With regard to the Genco transfer, PSE&G asserts that the transfer is consistent with the record in the restructuring proceeding, where PSE&G said that its objective was to

remain in the generation business, and where several parties argued for a divestiture of generating assets or a greater degree of separation from the electric public utility to alleviate market power concerns. Moreover, the contract for Genco to supply PSE&G full BGS requirements at a predetermined price puts considerable risk on Genco that would otherwise have been on the utility. PSE&G asserts that adoption of the Act, particularly subsections 7(f) and (l), N.J.S.A. 48:3-55(f) and (l) reinforced the desire for greater separation by limiting electric utilities' ability to offer competitive services, including electric generation service, but putting no such restrictions on competitive business segments of a public utility holding company. It maintains that a transfer to a related competitive business segment of PSE&G's holding company is consistent with the Act and meets the interests of not having competitive generation service adversely impact PSE&G's regulated service or create the potential for cross-subsidization.

PSE&G further asserts that the transfer is also consistent with subsection 7(d) of the Act N.J.S.A. 48:3-55(d), which requires that a transfer "shall be recorded at full value as determined by the board." The value of the generating assets was extensively litigated in the proceeding, and the Stipulation sets the value of the generating assets at $1.768 billion, based upon an agreement in paragraph 10 of the Stipulation that recovery-eligible stranded costs amount to $3.3 billion which, subtracted from the net book value of $5.068 billion, equals $1.768 billion. PSE&G emphasizes as noteworthy the fact that Enron and IEPNJ, representing direct competitors of Genco in the generation marketplace, have agreed to this valuation. PSE&G points to a further benefit of the transfer, namely the advance on the $600 million MTC payment which is to be provided to PSE&G, which will be used to retire debt and reduce the utility's capitalization. As well, per paragraph 33 of the Stipulation, responsibility for nuclear decommissioning will pass to Genco along with transfer of the decommissioning trust fund; thus addressing one of the major concerns of the RPA.

PSE&G asserts that the BGS contract envisioned in the Stipulation is consistent with both subsections 9(b)(2), N.J.S.A 48:3-57(b)(2), in terms of its. pricing provisions and 9(b)(3), N.J.S.A. 48:3-57(b)(3), in terms of the alternative cost recovery mechanism tied to maintaining price stability, of the Act. The parties to the Stipulation have requested Board approval of key terms of the transfer as set forth in the Stipulation, and PSE&G has committed to a subsequent timely filing with the Board with the accounting details and other contractual provisions governing the transfer. The Company recognizes the Board's continued jurisdiction over the transfer until the Board accepts the executed BGS contract, the separate entities are established and capitalized, books of accounts are established and the assets transferred, appropriate monies are paid to PSE&G, and requisite regulatory approvals are obtained. Moreover, PSE&G asserts that, because paragraph 20 of the Stipulation provides that auditable accounting protocols be in place no later than the transfer effective date to assure that all expenses and capital expenditures related to generation are borne by Genco, it is appropriate that the parties agreed in paragraph 28 that net revenue sharing per subsection 7(d) of the Act, N.J.S.A. 48:3-55(d), need not apply during the period after the Board issues an order approving the Stipulation but before all regulatory and other approvals are attained and the actual transfer is effectuated.

PSE&G points to various provisions in the Stipulation as maintaining reliability of service to BGS customers, including the requirement that any sale by Genco of the transferred generating assets include a requirement that the buyer assume the obligations of the BGS contract, continuation of the Board-approved natural gas supply relationships between PSE&G and the transferred generating facilities, transfer of related contractual rights and obligations, and maintenance of the transferred generating capacity as a capacity resource within PJM during the transition period. As to the latter, PSE&G notes that there is no such obligation for any other traditional utility or new load serving entity under the PJM

Reliability Assurance Agreement not to sell capacity outside PJM as it loses load to competing suppliers, and instead to market any excess capacity first within PJM.

For Codes of Conduct, PSE&G recommends adoption of the alternative provided in paragraph 30 of the Stipulation. It objects to Enron's proposed alternative in paragraph 30A because its scope encompasses all affiliates, not just those engaged in the retail sale of electricity. PSE&G submits that the Board should approve the transfer of its generation assets to Genco pursuant to its authority to approve dispositions of utility property under N.J.S.A. 48:3-7 and it maintains that the only substantive concern in this regard, that the utility's pension obligations continue to be satisfied, is addressed in paragraph 31 of the Stipulation. Moreover, it asserts that the requirements of N.J.A.C. 14:1-5.6(a) will be substantially satisfied on or before the date of transfer, and that a waiver pursuant to N.J.A.C. 14:1-5.6(l) of any requirement in N.J.A.C. 14:1-5.6(b) that the generation assets be advertised is justified, given the voluminous record in this matter concerning market value of the transferred assets, the uniqueness of the property and the unusual nature of the transaction. Finally, PSE&G recommends approval of paragraph 34 regarding the proposed Third Party Supplier Master Service Agreement, in order that the proposed tariff serve as a template to be modified based upon mandates in the Act and decisions by the Board on related third party supplier agreement issues.

2. Ratepayer Advocate

The RPA, a signatory to Stipulation II, requests that the Board reject the Stipulation and instead adopt Stipulation II. The RPA asserts that the initial 5% rate reduction in the Stipulation violates the Act, arguing that subsection 4(d)(2) of the Act, N.J.S.A. 48:3-52(d)(2), requires a 5% reduction from April 30, 1997 rates and that the 5% reduction in the Stipulation is from current rates, which include a 3.9% increase effective April 1, 1998. Moreover, it asserts that the Stipulation's conditioning of the remaining rate reductions

upon the implementation of a securitization transition charge violates the Act, which requires that mandated rate reductions be achieved whether or not any portion of stranded costs are securitized. It asserts that, under the Stipulation, at the end of the four year transition period, all of PSE&G's rate reductions will completely terminate, which it claims is contrary to the subsections 4(f) and (j) of the Act, N.J.S.A. 48:3-52(f) and (j). Moreover, the RPA asserts that the proposal to eliminate all rate reductions as of July 31, 2003, including the estimated 3% from securitization, violates section 14 of the Act, N.J.S.A 48:3-62, which requires that the entire amount of savings from securitization shall be passed on to ratepayers over the full term of the bonds, in this case for 15 years. By contrast, Stipulation II provides for sustained rate reductions in years five and six and beyond. The RPA does not object to a four year transition period instead of seven years as originally filed by PSE&G, however, it notes that the significance of this period under the Stipulation is that rates will automatically increase in year five (beginning August 1, 2003).

The RPA does not object to the use of the 1995 cost of service study within the context of the Stipulation II, but if Stipulation II is not accepted in full, the RPA asserts that use of the 1992 cost of service study is contrary to the Board's Final Report, since the 1995 cost of service study was never the subject of review in a base rate case. The RPA also objects to the Stipulation's proposal to add $80.46 million in costs related to post-retirement benefits other than pensions ("PBOP") to its unbundled distribution rates, for the following reasons. First, using the Company's established electric/gas revenue requirement allocations, only 76% of this cost (approximately $60.1 million) should be included in electric rates; second, PSE&G's actual total revenue requirement is only $68.3 million, not $80 million, thus the electric revenue requirement portion would only be $52 million; and third, a portion of the FAS-106 PBOP revenue requirement is property functionalized to generation, rather than 100% to distribution as proposed in the Stipulation.

The RPA asserts that the proposed amortization of electric distribution depreciation reserve fund in paragraph 4 of the Stipulation should be rejected by the Board because it represents excess money that has been collected from ratepayers, which would normally be returned via a reduction in depreciation rates, but that under the Stipulation would be used to fund statutorily-required rate reductions. Instead, Stipulation II would use 60% of the excess distribution depreciation reserve to fund sustained rate reductions beyond year four, and only the remaining 40% would be used to fund rate reductions in years one to four as an offset to the MTC as in the PSE&G Stipulation.

Regarding the SBC, the RPA asserts that the Board should require a more detailed list than that provided in the Stipulation of all items that may be included in the SBC, and should also provide actual calculations of the DSM charge and its derivation, including the appropriate level of generation lost revenues to be removed per the Stipulation. The collection of interest on the deferred SBC costs, as contemplated in the Stipulation, is not specifically allowed under the Act, and is contrary to the Board's existing regulations for LEAC underrecovery. Moreover, if allowed at all, interest should be based on the short-term debt rate, not the seven year debt rate, since the transition period is only four years.

The RPA asserts that it is PSE&G's obligation to maximize the price it gets for NUG power that will flow through the NTC; therefore NUG power should be sold through PJM or at the market, whether inside or outside PJM, whichever is greater. Moreover, the Board should order PSE&G to update the NUG costs to be included in the NTC, and should require PSE&G, at the very least, to attempt to mitigate NUG contracts held by its own affiliates, or demonstrate why it could not mitigate such costs, before it is permitted to recover above-market NUG contract costs. The RPA also expresses the same concerns regarding the computation of interest on deferred NTC costs as articulated

above with respect to SBC costs, although noting that, if adopted in full, Stipulation II would allow interest on under- and overrecoveries in the NTC.

The RPA asserts that the recovery of $3.075 billion of stranded costs provided for in the Stipulation is $800 million higher than the stranded cost estimate of every party to the litigated case except for PSE&G, and that the Stipulation provides only one mitigation action; the foregone $90 million in Salem costs. While the Stipulation provides a virtual guarantee of an additional $600 million above the securitized level, Stipulation II would provide the opportunity to recover such costs through mitigation, a portion of the retained retail adder, and a portion of the depreciation reserve amortization. Moreover, the asserted overstated stranded cost level is, the RPA argues, directly related to an undervaluation of PSE&G's generating plants. While the Stipulation sets that value at $1.768 billion, the most reasonable estimate is between $2.4 billion and $2.9 billion. Accordingly, the RPA asserts that the best estimate of generation-related stranded costs is between $2.2 billion and $2.7 billion, far below the Stipulation's $3.075 billion guaranteed recovery level.

The RPA asserts that it is unclear that the Stipulation's provision of $2.475 billion of securitization does not violate subsection 14(c)(1) of the Act, N.J.S.A. 48:3-62(c)(1), since the recovery eligible stranded costs provided in the Stipulation appears to be $3.075 billion, 75% of which would be only $2.306 billion, or subsections 13(c) and (f) of the Act, N.J.S.A. 48:3-61 (c) and (f), because the $3.075 billion figure appears not to recognize mitigation and the transfer values from asset sales or divestitures. The RPA objects to the Stipulation's proposal that customers pay 100% of securitization issuance costs, and argues that, as the ALJ determined, such costs should be shared on a 50%/50% basis by utility shareholders and customers. It further maintains that issuance costs should not exceed $62.5 million based on current estimates, not $125 million as provided in the Stipulation. The RPA also objects to the recovery through the

transition bond charge ("TBC") of taxes associated with securitization, arguing that such costs should be recovered via the MTC as a separate tax MTC instead. The RPA also objects to the Stipulation's requested findings that PSE&G has reasonably-mitigated its stranded costs, since it asserts the Stipulation provides literally no achieved or expected mitigation. Moreover, the RPA contests the requested finding that PSE&G could not achieve the mandated rate reductions absent securitization, since it claims to have proven in the case that PSE&G could reduce rates by 15% from April 1997 levels for a seven year period and maintain its financial integrity, and the ALJ found that rates could be reduced by 10-12% over a seven year period without jeopardizing the Company's financial integrity. The RPA further asserts that the Stipulation provides securitization savings only during the years 2000 through 2003, rather than over the entire 15 year life of the bonds as required in subsections 14(a) and (b)(3) of the Act, N.J.S.A. 48:3-62(a) and (b)(3).

The RPA asserts that the Stipulation's phased distribution depreciation amortization alone will provide the Company a $458 million net present value contribution toward stranded costs, guaranteeing recovery of an 'indisputable" 76% of the $600 million of unsecuritized stranded costs which PSE&G is only supposed to have an "opportunity" to recover. In addition, assuming 5% incremental load loss to competing suppliers in each of the years 1999 through 2003, the 2 mill per kwh retail adder retained by PSE&G will produce an additional $271 million nominal, and $120 million after-tax net present value contribution towards stranded costs. Thus, the RPA asserts that these two items alone "guarantee" the recovery of 96% or more of the $600 million, which PSE&G is only supposed to have an "opportunity" to recover.

As to BGS and shopping credits, the RPA reasserts that the level of shopping credits in Stipulation II, as opposed to those provided in the Stipulation, are necessary to stimulate a robust competitive market, and reiterates the arguments on

this issue which are found at pages 23 through 27 of Stipulation II.

As to the proposed transfer of PSE&G's generation assets to an unregulated affiliated entity or Genco, the RPA argues that this proposal was not made in the evidentiary record, it implicates many other issues in the case, and the Stipulation would effectuate the Genco transfer without any further filings by PSE&G, or any additional Board review. The RPA asserts that the Board should either defer resolution of the transfer pending evidentiary hearings, or in the alternative adopt Stipulation II on all issues relating to the Genco formation and asset transfer. Moreover, while the Stipulation appears to recognize that the generating assets are worth at least $600 million more than the net book value less estimated stranded costs, it provides for customers to repay the $600 million to Genco; thus the true transfer value is only $1.8 billion. By contrast, as set forth in Stipulation II, a reasonable market value of the assets to be transferred is $2.9 billion based on recent market evidence, which is considerably higher than the "administratively determined" estimate reflected in the Stipulation. The RPA asserts that Stipulation II, which reduces the MTC to zero, recognizes the appropriate transfer value as $2.368 billion, thus providing ratepayers the additional market value for the assets transferred.

The Genco transfer in the Stipulation also entails the transfer of all contracts associated with the electric generating business and other contractual rights and liabilities; however no transfer valuation for, or even a listing of, these rights and liabilities is provided. The RPA also finds objectionable the request in the Stipulation for a waiver of N.J.A.C. 14:1-5.6, since it would allegedly result in a blind approval of an asset transfer without the provision of complete documentation of what is being transferred.

The RPA reiterates the recommended Code of Conduct and Affiliate Relations rules set forth in the Stipulation II. The RPA also requests that the Board order that Genco

maintain transferred capacity as a capacity resource within PJM for the first four years, and that the Board require the submission of a plan and proposal for the transfer providing details including a specific list of transferred assets, contracts and intangibles-. specific accounting entries; and the effect of the transfer on reliability and existing collective bargaining agreements or workforce levels.

The RPA further asserts that the Board should disregard paragraph 34 of the Stipulation, since the subject tariff modifications are outdated, addressed in the Act, and/or are the subject of generic restructuring proceedings and discussions. Nonetheless, the RPA provides specific comments with respect to specific issues related to the third party supplier agreement, including the customer enrollment package, customer usage records, customer authorization and confirmation, minimum contract terms, switching fees and the billing of customers.

3. Mid-Atlantic Power Supply Association

MAPSA, a signatory to Stipulation II, submits that the Stipulation should be rejected as it fails to properly implement the four principal goals of the Act; specifically: (1) to provide guaranteed ratepayer benefits by implementing the required minimum rate discounts; (2) to provide fair treatment to the utility and its shareholders by giving them an opportunity to recover quantifiable, fully mitigated stranded costs; (3) to create a vibrant competitive environment by establishing appropriate shopping credits; and (4) to assure a level playing field through the establishment of appropriate rules and requirements. MAPSA argues that the Stipulation is flawed because it fails to allow for the development of a competitive market, it does not guarantee fulfillment of the minimum rate discount requirements of the Act, and it does nothing to address rate shock in years five and six.

MAPSA contends that while the Stipulation claims to establish a level of stranded costs of $3.3 billion, and an opportunity to recover only $3.075 billion through unbundled

rates, the real opportunity to recover stranded costs is more than $l billion greater this claim. It identifies the recovery opportunities as follows: $2.6 billion (including $125 million for bond issuance costs) via the Securitization Transition Charge, $120 million via retained a retail adder, $460.5 million via the distribution depreciation reserve amortization, $90 million via the agreed upon Salem cost reduction, $90 million via the LEAC overcollection at July 31, 1999, $35 million via expired amortizations, $800 million via documented mitigation opportunities, and $600 million via the Genco transfer premium. Moreover, MAPSA asserts that this list does not include a quantification of additional value from the Genco transfer, including the value of purchased power and gas supply contracts, good will, fixed transmission rights, emission reductions and NOX credits, footprint for new plants or plant expansion, avoidance of new plant siting and building costs, the value of capacity in PJM, and the value of ancillary services. Accordingly, MAPSA asserts that the Stipulation provides PSE&G with over $1.5 billion in excess compensation, which leads to inadequate shopping credits, an uncertain level of rate reductions, and rate spikes in years five and six.

MAPSA asserts that PSE&G's approach to calculating the BGS charge or shopping credit is skewed, by using an out-of-date and understated market line to calculate energy costs and a dramatically understated retail adder to reflect retail delivery costs and the ability to offer savings to customers. The shopping credit or BGS charge is, in MAPSA's view, more appropriately calculated by using the so-called Pennsylvania "residual" method. This method begins with the bundled rate after recognizing the discount, and subtracts from that bundled rate the distribution rate, transmission rate and societal benefits rate and taxes to derive the generation rate; from the generation rate is subtracted the stranded cost charges (STC or MTC); the remainder is the shopping credit. MAPSA adds that if the level of the shopping credit thus produced is not sufficient to produce robust competition, then the structure or timing of stranded cost recovery must be

adjusted. Under this method, if an "excess" is created in the remaining rate level, it will be used to enhance competition, as opposed to the PSE&G approach under which any excess would flow to increase the MTC.

MAPSA further submits that savings of at least 5-7% must be offered by suppliers to entice customers to switch; savings at this level can only be offered if the shopping credit is sufficient to cover the cost of procuring and delivering power, the cost of marketing and customer service, and the need to provide a margin. MAPSA asserts that the PSE&G shopping credit understates the forward cost of energy by at least 4 mills, and the retail adder of 2 mills is inadequate for a supplier to cover retail costs and offer savings.

MAPSA asserts that the Pennsylvania experience demonstrates the importance of a shopping credit that offers savings to customers. The shopping credits established for PECO Energy ("PECO") in Pennsylvania have assertedly produced the most robust competitive market in that state; 1/3 of eligible load has switched to alternative suppliers, including 14% of residential customers. In neighboring territories in Pennsylvania, where shopping credits are 6 mills to 18 mills lower (depending on company and customer class) per kwh, shopping is alleged to be virtually non-existent. Thus, MAPSA asserts, the PECO shopping credits should be used as the starting point; but must be updated to account for New Jersey specific costs and generic energy market cost increases

With respect to the Genco transfer, MAPSA notes that the Stipulation acknowledges that the value of the generating assets is significantly higher than the adjusted (net book cost less "stipulated stranded cost") book value, yet this $600 million premium is to be transferred to PSE&G without ratepayers receiving any benefit via greater rate reductions or larger shopping credits. MAPSA maintains that the benefits of the higher "real market value" of the generating assets should be given back to ratepayers. If the Board does not credit the $600 million premium to ratepayers, then it should

either disapprove the transfer, require PSE&G to actually divest its generation, or establish a yearly true-up to capture future market events if they show that the assets were transferred at an undervalued amount. Moreover, MAPSA asserts that the Stipulation lacks details concerning the transfer and appears to overlook or dismiss the need for various filing requirements and approvals.

MAPSA asserts that while the Stipulation contains some limited provisions to prevent Genco from exercising anti-competitive behavior, they are limited and must be expanded upon to address the following issues: there should be an absolute ban on Genco from making direct retail sales; the exceptions provided Genco from the requirement that the generating capacity be maintained in PJM for four years could be exercised in a manner which raises capacity prices in PJM; and the codes of conduct must provide a process for allowing competitors to ascertain whether unreasonable preferences are being provided, including reporting and public posting of offers by Genco for sales to affiliates.

MAPSA also comments that the Stipulation is unclear on the process of finalizing PSE&G's Third Party Supplier Master Service Agreement, which as filed, assertedly contains a number of troubling provisions, nor does it mention an affiliate code of conduct, which must be adopted and implemented before competition commences. Finally, MAPSA asserts that elements of the Stipulation, including elements related to the Genco transfer and the reasonableness of the shopping credits, are not supported by the record, and there is a need for additional hearings and testimony in order to avoid violation of the parties' due process rights.

4. <u>New Jersey Public Interest Intervenors</u>

NJPII (with the exception of the NRDC), a signatory to Stipulation II, urges rejection of the Stipulation and Board approval of the alternative Stipulation II. It argues that the Stipulation does not guarantee the mandated rate reductions, rather the reductions are contingent upon securitization.

Moreover, NJPII cautions the Board to take note of developments in Massachusetts and California as evidence that setting shopping credits too low can result in an inactive market, and points to activity in Pennsylvania, specifically the PECO shopping credits, as evidence of how setting the shopping credits at appropriate levels can foster competition. According to NJPII, the Stipulation's shopping credits fail to account for all of the costs to deliver electricity to New Jersey and the empirical data from a year's worth of activity in the PECO service territory. NJPII argues that the market values underlying the stranded costs identified in the Stipulation do not reflect required mitigation activities and ever-increasing empirical evidence that the market value of fossil generation is understated. Recent sales of fossil generation have assertedly resulted in significant premiums over book value and NJPII maintains that ratepayers should receive this benefit.

5. New Energy Ventures

NEV, a signatory to Stipulation II, urges the Board to reject the Stipulation, and instead to approve Stipulation II. NEV submits that robust competition has occurred in the PECO service territory where meaningful shopping credits have been provided, whereas in Massachusetts there has been little competitive activity because the Standards Offer, which is similar to the shopping credit, is low relative to market prices. NEV asserts that the PECO model provides an excellent framework and starting point for New Jersey. However, since the PECO settlement, there have been increases in wholesale market prices, and NEV maintains that certain adjustments should be considered to ensure that New. Jersey customers receive rate discounts of equal magnitude as PECO customers. NEV argues that the shopping credits in Stipulation II are more equitable for all customer classes than those in the Stipulation, as evidenced by the broad range of customers signing Stipulation II and the assurance of the discounts that will be offered.

NEV also asserts that the Stipulation contains only vague and insufficient codes of conduct governing PSE&G's relationship with Genco, and that it also tilts the playing field in favor of the incumbent in terms of various customer issues, including fees for switching and obtaining information. NEV urges the Board to develop a forum for resolving these issues. Finally, NEV urges the Board to address metering and billing issues, including a prohibition against PSE&G issuing a single bill for supplier and utility charges, and the promulgation of metering and billing rules by January 1, 2000.

6. New Jersey Industrial Customer Group

NJICG, a signatory to Stipulation II, urges the Board to reject the Stipulation and to instead adopt Stipulation II. It asserts that the Stipulation violates the Act by rendering the achievement of the mandated minimum rate reductions contingent upon securitization, while, in contrast, Stipulation II has no such "strings" attached. Moreover, NJICG asserts that the level of securitization in the Stipulation violates the Act because although the Act limits securitization to 75% of "recovery eligible" stranded costs, after recognizing mitigation and the transfer values from asset sales or divestitures, the Stipulation derives the $2.475 billion of securitized stranded cost by multiplying $3.3 billion times 75% without recognition of the factors required by the Act. NJICG notes that if the level of securitization were to be decreased to correct this flaw, PSE&G would not be denied the opportunity to recover the disallowed portion of the securitization figure, but could attempt to recoup these amounts via the MTC.

NJICG argues that the $1.8 billion transfer price for the Genco transfer dramatically understates the actual market value, indeed it has no connection to the market value, which it asserts to be more on the order of $2.9 billion. Moreover, according to NJICG, ratepayers are also shortchanged because the $600 million transfer premium which is included in the Stipulation would be paid directly by Genco to PSE&G,

whose shareholders would receive an immediate benefit, and the ratepayers would repay this $600 million to Genco via the MTC revenue stream. NJICG further questions the legality of this arrangement, since the Act only authorizes utilities to recover an MTC based on the above-market" portion of their generating assets, and the Act also requires "net proceeds" from the sale of generating assets to be reflected in a timely adjustment to the MTC. NJICG maintains that once PSE&G receives the $600 million premium, its unsecuritized stranded costs must be reduced to zero. Finally, on this issue, it argues that if, according to PSE&G, Genco is paying "fair market value for the assets transferred," then, by definition, there are no stranded "above market" costs for Genco to collect through an MTC, even assuming the statutory authority to do so.

With regard to shopping credits, NJICG asserts that the PSE&G shopping credits are unsupported and are too low to spur competition; they must be set to reflect the real costs of doing business in New Jersey. The PECO level of shopping credits must be updated to account for changes in energy markets since the PECO credits were set, as well as to reflect New Jersey-specific considerations. One or two marketers agreeing to a level of shopping credits is not sufficient to insure that there will be a competitive marketplace; rather, there must be a "sufficient number" of "good alternatives" to basic generation service, such as the four to five good alternatives required by the FERC to demonstrate a competitive natural gas pipeline market.

NJICG asserts that the rate design contained in the Stipulation, which employs a temporary "rate reduction credit" rather than a reduction to existing rates, will lead to an automatic rate spike after July 31, 2003. Moreover, the use of deferral accounts for the SBC and NUG contract costs in the Stipulation will likely exacerbate rate spikes after July 31, 2003. NJICG maintains that Stipulation II removes the rate spike problem for at least two additional years, and more

appropriately leads to a sharing of burdens to recover stranded costs and reduce rates between shareholders and customers.

7. **The Coalition for Fair Competition**

The CFC, which was not a signatory to either Stipulation, asserts that the Stipulation is not conducive to fair competition or compliant with the Act because it would allow PSE&G to transfer generating assets to an unregulated affiliated Genco at book value, and thereby falls to mitigate PSE&G's stranded costs through the market-based valuation of assets. To prevent the Genco transfer from acting as a massive subsidy for competitive activity, the CFC argues that the Board should require proper market based pricing of the assets, compensation to ratepayers based upon this market value, and the adoption of stringent standards for fair competition. The CFC also asserts that the rate reductions provided in the Stipulation cannot be tied to securitization, and that PSE&G has not demonstrated the need for securitization to achieve the mandated rate reductions.

The CFC argues that the Board does not have the authority to approve the proposed Stipulation "as is"; that the Stipulation violates the Act, and that there is a need for public and evidentiary hearing to develop an evidentiary record before the Board acts on the Stipulation. The CFC argues that a contested partial stipulation amounts to a joint petition which must be fully reviewed by the Board to assure compliance with the law, to ascertain whether it is supported by the record, and to assure fairness to- all affected parties and interests. The CFC argues that because PSE&G failed to submit the evidentiary basis and statutory sources for each position in its proposal, as was done with Stipulation II, the PSE&G Stipulation must be rejected.

The CFC asserts that the excess depreciation revenue amounts to an overcollection of $567 million, which should be refunded to ratepayers with interest and not counted as part of the mandated rate reductions. It recommends that an Order to Show Cause be issued to commence an investigation into

whether there are additional overcollections. The CFC also asserts that the provisions of the Stipulation (paragraphs 5-7) providing full recovery of the four categories of costs in section 12 of the Act, N.J.S.A. 48:3-60, providing that the SBC level will remain constant for four years, are not mandated by the Act. It argues that full recovery of costs was only assured in the Act for DSM costs, and that funding levels should not be frozen for four years given the requirement in the Act that the BPU conduct a proceeding to determine the proper level of DSM funding for the next four years.

The CFC further maintains that absent an actual sale or auction of assets, stranded costs must be calculated using comparable sales, which assertedly show that generating assets have netted purchase prices far in excess of book value. The CFC asserts that PSE&G has not satisfied the Act's requirement that in support of its securitization request it demonstrate that it has taken all reasonable steps to mitigate its stranded costs, including dedication of up to 50% of net revenues from utility-offered competitive services and 25% of net revenues from holding company affiliate competitive services as required by subsections 7(b) and 7(l) of the Act, N.J.S.A. 48:3-55(b) and (l), and that it could not achieve the mandated rate reductions without securitization. The CFC further asserts that there are distinct statutory standards for setting shopping credits and for setting BGS prices. Therefore, rather than simply establishing shopping credits equal to the BGS price, as provided in the Stipulation, the CFC argues that the BGS and shopping credits should each be established, after an in-depth analysis, as separate determinations, with the shopping credits set to create a truly viable and robust competitive marketplace. The CFC also contends that fixing the level of the shopping credits for four years, as provided in the Stipulation, is "folly," and that there should be at least annual resettings to reopen and reevaluate the level of the shopping credit to assure competition as required by the Act. Further, the CFC argues that PSE&G has not demonstrated that the provision of BGS through a bilateral contract with Genco under the terms of the

Stipulation is compliant with section 9(b)(2) of the Act; N.J.S.A. 48:3-57(b)(2), since there is no need for PSE&G to supply BGS when there is an abundance of competitive sources from which to choose.

Regarding the proposed transfer of assets to Genco, the CFC endorses PSE&G's decision to start divestiture of competitive business assets and units, but it stresses that there are three keys to a proper transfer: establishment of transfer value and compensation to be paid to ratepayers; establishment of standards of fair competition or affiliate codes of conduct; and a true-up of the MTC. The CFC asserts that the previously-struck testimony it sponsored in the proceedings with respect to transfer pricing must now be admitted and, given full evidentiary weight, since the Genco proposal in the Stipulation has "opened the door" to this testimony. The CFC further argues that subsection 7(d) of the Act, N.J.S.A. 48:3-55(d), requires the Board to adopt rules and regulations which will govern the transfer of electric utility assets to a corporate affiliate, but that no such regulations have been proposed or adopted. Moreover, the Stipulation reflects a transfer at depreciated book value, which is asserted to be far below market value of the assets as demonstrated by recent generation asset sales (which the CFC claims show sales from 2.5 to 5 times book value), and is therefore in violation of section 7 of the Act, N.J.S.A. 48:3-55, as well as preexisting law. The transfer proposal is also asserted to be in violation of subsection 13(g) of the Act, N.J.S.A. 48:3-61 (g), since there is no provision for a true-up of stranded costs after the transfer has been made. The CFC favors the affiliate standards supported by Enron, as reflected in paragraph 30A, of the Stipulation, but indicates that, at a minimum, the Genco/PSE&G relationship must be made expressly subject to the standards the Board adopts pursuant to sections 7 and 8 of the Act, N.J.S.A. 48:3-55 and 56.

With regard to the Stipulation itself, the CFC claims that if fails to meet the standards set forth in I/M/0 Petition of PSE&G, supra. The CFC alleges that the signatories to the

Stipulation are not a diverse group of parties with opposing interests who negotiated hard at arms length, as argued by PSE&G, but rather represent a group of parties with close ties to PSE&G, who were chosen by the Company for closed door negotiations and were vulnerable to PSE&G pressure and undue influence, and were "induced" to sign by PSE&G. Finally, the CFC opposes the Stipulation's requested waiver of certain provisions of section 7 of the Act, N.J.S.A. 48:3-55, (paragraph 28 of the Stipulation), and N.J.A.C. 14:1-5.6 (paragraph 32 of the Stipulation).

8. New Jersey Citizen Action

NJCA, which was not a signatory to either the Stipulation or Stipulation II, simultaneously filed its comments with respect to both the Stipulation and Stipulation II. NJCA asserts that the Stipulation falls short of the legislative mandate on rate reductions, because while the Act requires achievement of the minimum rate reductions as a requirement for securitization, the Stipulation conditions the rate reductions on the approval of securitization. It argues that PSE&G has an obligation to demonstrate that R cannot go beyond the mandated 10% rate reduction without harming shareholders and employees. It also expresses concern regarding potential rate spikes in year five under the Stipulation, which would violate the spirit and the letter of the Act, since it argues the intent of the Act is to provide lower rates in a sustained fashion and create a competitive market. While Stipulation II does address the rate spike in year five, NJCA indicates that it has been unable to independently verify the impact of the allocations on the Company. Additionally, it criticizes the proposal in Stipulation II that allows the Company to wait four years to repay customers for $90 million in Salem related stranded costs, versus the immediate return under the Stipulation. Further, NJCA questions the provision in Stipulation II which would permit PSE&G to retain 40% of the excess depreciation reserve. NJCA questions why rates cannot be reduced further under either proposal given the high level of securitization of

stranded costs, since it understands stranded costs as the reason for current high rates. In light of the provisions of the Act permitting an opportunity for full stranded cost recovery, NJCA does not oppose the level of stranded cost recovery and securitization embodied in both the Stipulation and in Stipulation II; however, it expresses concern regarding the valuation of the generating assets proposed to be transferred to Genco, and supports the RPA's request for a further review of the transfer price issue. NJCA also opposes the collection of taxes related to securitized stranded costs via the transition bond charge as proposed in the Stipulation, arguing that such costs should be recovered a separate MTC instead. NJCA further maintains that issuance costs should be borne by shareholders or, in the alternative, be shared, with the ratepayers' share collected through an MTC.

As to the issue of shopping credits, NJCA asserts that while a reasonable shopping credit, similar to levels established in the PECO settlement, can assist in the competition, it is not a "magic bullet." NJCA urges the Board to follow the pattern of both stipulations and set a higher shopping credit for residential customers.

9. New Jersey Business Users

NJBUS, a signatory to Stipulation II, urges rejection of the Stipulation and the adoption in its place of Stipulation II. NJBUS asserts that the initial 5% rate reduction in the Stipulation violates subsections 4(b) and (d) of the Act, N.J.S.A. 48:3-52(b) and (d), by including in that initial reduction a "prefunded" 1 % of the securitization savings, arguing that, in effect, the initial rate reduction would only be 4%, not the 5% required by the Act. Moreover, NJBUS maintains that there is no basis for a finding that if 1% of the securitization savings is prefunded, there will be net present value savings over the life of the bonds as required by subsection 14(b) of the Act, N.J.S.A. 48:3-62(b). Prefunding, NJBUS alleges, deprives customers of savings equal to 1% of revenues per year for at least two years, or $80 million, because the Act requires that the 5% rate reduction must be

implemented whether or not there is securitization, and all securitization savings must be passed through to customers on a timely basis, per subsection 4(l) of the Act, N.J.S.A. 48:3-52(l). Assuming securitization savings of 3%, NJBUS argues that the Act requires rates to be reduced by at least 8% (5% minimum initially plus the 3% securitization savings) as of January 1, 2000. NJBUS also argues that subsection 4(d)(2) of the Act, N.J.S.A, 48:3-52(d)(2), requires that the initial 5% rate reduction be measured against April 30,1997 rates, not against current rates as assumed in the Stipulation. NJBUS asserts that, at best, the third year rate reduction would be worth only $10 million to ratepayers and thus, under the Stipulation's prefunding program, customers would be deprived of $70 million in rate reductions.

NJBUS maintains that the rate reductions must be applied to each of the unbundled rate elements, not as a separate rate reduction line item as provided in the Stipulation, otherwise, there would be an automatic rate increase of at least 13.9% on August 1, 2003 by eliminating this rate reduction line item, in violation of the requirements of subsection 4(j), N.J.S.A. 48:3-52(j) of the Act, for sustainable rate reductions. Stipulation II extends the rate reduction level in year four for another two years, and retains those rates in year seven and beyond, unless rate increases are approved by the Board after a full rate case. NJBUS asserts that there are additional funds available to sustain rate reductions beyond those explicitly contemplated in Stipulation II, including sharing of Genco competitive service revenues pursuant to section 7 of the Act, N.J.S.A. 48:3-55, and application to regulated rates of all net revenues derived from the bilateral BGS supply contract between Genco and PSE&G, pursuant to subsection 9(b)(2) of the Act, N.J.S.A. 48:3-57(b)(2). NJBUS contends that the Stipulation inappropriately attempts to circumvent or otherwise waive these requirements

NJBUS objects to the generation asset transfer contemplated in the Stipulation, asserting that there is a

substantial underevaluation of the assets, and that because the transfer was not presented in PSE&G's original filing, it does not have record support. Moreover, NJBUS contends that neither the value of the BGS contract nor the other contractual rights being transferred has been calculated. The $2.368 billion transfer value is asserted to be a "sham," since $600 million to be collected by PSE&G via the MTC will be repaid to Genco. NJBUS argues that the recovery by Genco of the $600 million is virtually guaranteed; accordingly, the true asset transfer value being paid by Genco is only $1.768 billion. NJBUS submits that, as set forth in the affidavit of Michael B. Dirmeier attached to Stipulation II, a conservative value for the owned generating assets is $2.9 billion, which, after tax, translates to a transfer value of $2.4 billion. This estimate is based on reported sales of utility generating plants over 35,000 megawatts nationwide over the past 18 months. Subsection 13(e) of the Act, N.J.S.A. 48:3-61(e), requires that, in quantifying stranded costs, the full market value of each asset, including value that would not be realized until after the expiration of the MTC must be demonstrated. Mr. Dirmeier's approach is asserted by NJBUS to do just this. NJBUS maintains that subsection 11(c) of the Act, N.J.S.A. 48:3-59(c), requires the Board to approve any generating asset sale, based on findings that the sale reflects the full market value is in the ratepayers' best interests. NJBUS asserts that because the Stipulation requires ratepayers to repay $600 million, the actual sale price of $1.7687 billion does not reflect full market value. Moreover, absent the asset transfer, section 13(g) of the Act, N.J.S.A. 48:3-61(g) would require a periodic review and true-up of market valuation and adjustment to stranded cost recovery accordingly, which offers ratepayers protection against stranded costs being set too high (because market valuation is too low) based upon an administrative estimate. NJBUS contends that the proposed asset transfer in the Stipulation eliminates this protection, and therefore must be rejected unless the transfer occurs at full market value. It maintains that the Company's initial filing did not support an immediate transfer of assets, only an asset

transfer after the then-proposed transition period, and that the details of such proposed transfer were vague. NJBUS thus asserts that the record does not supply an adequate foundation for the transfer of assets based on a market value of $1.768 billion, as implied by the Stipulation.

NJBUS also claims that the value of the BGS contract is a valuable right afforded Genco above and beyond the asset transfer, which value has not been, but should be, considered. NJBUS further alleges that other valuable contract rights, including power and fuel contracts, real and personal contracts and other contractual rights and liabilities are proposed to be transferred without compensation, and the value has not been, but should be calculated and considered. NJBUS maintains that one of the most important items transferred to Genco is the ability to control the scheduling and use of PSE&G's transmission assets as PSE&G's agent, thereby enabling Genco to use PSE&G's transmission rights to make unregulated sales and bypassing PSE&G's responsibility to release transmission rights to the market on the electronic bulletin board, and that the generation sites themselves may also have significant value. NJBUS claims as well, that the right to collect net revenues from the use of common assets and personnel, as required in section 7 of the Act, N.J.S.A. 48:3-55, should not be waived, as proposed in the Stipulation.

NJBUS further asserts that the amount of stranded costs which PSE&G seeks to securitize in the Stipulation violates the Act, since the recovery-eligible stranded costs as identified in the Stipulation, consistent with the use of that term in the Act, is $3.075 billion, and the $2.475 billion level of securitization exceeds the 75% limit imposed in subsection 14(c)(1) of the Act, N.J.S.A. 48:3-62(c)(1). NJBUS maintains that the Stipulation also fails to specify how the proceeds from securitization will be used to reduce rates, since it does not specifically identify the proportion of debt and/or equity that will be retired. NJBUS asserts that the Stipulation's proposal to collect revenue taxes associated with

securitization via the transition bond charge, which is to be established in an irrevocable bondable costs rate order, should be rejected; instead, a special tax MTC should be instituted which could be changed to address changes in federal tax laws. It also argues that any overrecoveries of the unsecuritized stranded costs by the end of the transition period should earn interest, which should be returned to customers and that the Stipulation makes no such provision.

Additionally, NJBUS asserts that there is no record evidence to support the Stipulation's shopping credit levels. All evidence in the record was based on mathematical modeling, not real market evidence; such evidence now exists and should be used, according to the NJBUS. It maintains that the Stipulation's shopping credits are too low to promote competition, pointing to affidavits attached to Stipulation II for support, including the affidavit of John S. Rohrbach which asserts that the shopping credits are-too low when compared to those set in the PECO territory more than a year ago, due to increases in energy costs, capacity printing, a higher congestion cost, and a higher tax rate in New Jersey as compared to Pennsylvania.

Finally, NJBUS urges rejection of the proposed tariff revisions in Attachment 6 to the Stipulation, which it asserts incorporates numerous provisions which were not available during the OAL proceedings, and which address many issues which the Board has set for generic resolution via restructuring working groups.

10. Co-Steel Raritan

The primary concern of Co-Steel, which. operates a steel "mini-mill" in Perth Amboy, in this proceeding, has been its ten year service agreement with PSE&G under the Experimental Hourly Energy Pricing Service ("EHEP") tariff, and specifically its assertion that its contract precludes the imposition of stranded cost-related charges either during or after the contract term, which extends until November 17, 2005. With respect to the period during the contract term,

Co-Steel asserts that the agreement unquestionably precludes the imposition of stranded cost charges, since the bargain was struck and investment decisions made based on the precise terms negotiated, which cannot be altered without the parties' consent. Moreover, Co-Steel argues that imposition of post-contract stranded cost charges based upon Co-Steel's consumption during the contract term would equate to a price increase during the contract term. Given the 10-year term of the contract and the interruptible nature of Co-Steel's electric service, Co-Steel maintains that it cannot be deemed to have caused any of PSE&G's stranded costs. To subject Co-Steel to stranded cost charges would give it the worst of both possible worlds: barred by contract from enjoying the benefits of competition, yet subject to stranded cost charges caused by the arrival of competition. Moreover, it contends that the imposition of stranded cost charges upon it would violate the constitutional prohibition against contract impairment.

Co-Steel, which was not a signatory to either the Stipulation or Stipulation II, raises certain concerns as to how the Stipulation would affect Co-Steel. It maintains that, on its face, the Stipulation is unclear as to what surcharges, if any, would apply to Co-Steel under its contract. Co-Steel contends that it has been advised by PSE&G that under Block 1 of the contract rate, which is pegged to the HTS tariff rate, Co-Steel would receive the same rate discounts provided to all other HTS customers, and that its Block 2 usage would be governed by contract and be unaffected by the Stipulation. Co-Steel contends that if it is determined that the Act requires that stranded cost charges be paid by Co-Steel, then the Act's requirement that all customers should have the ability to shop as of August 1, 1999 should also apply, and Co-Steel should be permitted to seek alternative suppliers. Imposition, of the securitization charge, the NTC and the MTC at the levels envisioned in the Stipulation would, according to Co-Steel, increase its annual bill in the aggregate by as much as $7.3 million, thus wiping out all the benefits derived from the contract the Board approved in 1995. Imposition of stranded cost charges after the contract expires would assertedly

impose $4 million or more annually on Co-Steel, which would effectively wipe out whatever benefits it would otherwise derive from seeking an alternative supplier at that time. Finally, Co-Steel argues that the proposed elimination of the current interruptible credit in the HTS tariff for customers who switch suppliers would completely offset the benefits of the HTS shopping credit, thereby economically preventing such a customer from switching suppliers.

11. PP&L Energy Plus

PP&L, which was not a signatory to either the Stipulation or Stipulation II, filed comments addressing both stipulations. PP&L indicates that it has not joined in either settlement proposal, because of significant issues with both. PP&L also indicates that it currently serves a large amount of competitive retail load in Pennsylvania, unlike some other-retail suppliers active in these proceedings. It asserts that neither stipulation adequately balances full and fair recovery of validly incurred stranded costs with robust shopping credits. PP&L challenges PSE&G's assertion that the Stipulation provides the largest shopping credits in the country, indicating that while this may be true on an average basis, the uneven distribution of shopping credits results in certain classes of customers having credits well below those provided to PECO customers, and that this will adversely impact competition for medium-sized commercial and industrial customers. PP&L asserts that the PECO shopping credit and the PECO settlement were addressed in the record in this matter, and argues that while the Stipulation's shopping credits are 2 mills higher than PECO's for residential and large industrial customers, representing those customers least likely and most likely to shop, respectively, they are 5.9 mills and 13 mills lower for LPL-S (general service-secondary) and LPL-P (primary distribution) customers, respectively. While Stipulation II does a better job of trying to ensure adequate credits for mid-sized customers, according to PP&L, it still falls short of a balanced, even distribution when compared to PECO's credits, with shopping

credits for residential and large industrial customers even higher than the Stipulation's, but with LPL-S and LPL-P credits still 11.8 mills and 3.7 mills lower, respectively, than the PECO credits.

PP&L agrees with the supporters of Stipulation II that there are certain cost differences between PECO and PSE&G such as taxes, transmission costs and congestion costs. However, PP&L does not agree with the wholesale forward energy and capacity projections set forth in Stipulation II. Therefore, while generally in favor of higher credits, PP&L proposes alternative shopping credits which, it asserts, are the minimum necessary to support robust competition for all customer classes, while balancing the interests of all concerned. PP&L proposes only modest increases to the shopping credits proposed in the Stipulation for medium-sized commercial and industrial customer classes, which, it asserts, only raise the average system credits by less than 1 mill per kwh over those in the Stipulation.

PP&L also asserts that the manner in which the Stipulation proposes to show rate reductions on customers' bill is confusing, and has provided alternative, simpler billing formats. Additionally, while supporting the generation asset transfer in the Stipulation, it also supports strengthening the codes of conduct language in paragraph 30. Finally, PP&L opposes the Third Party Supplier Agreement embodied in the Stipulation, 2nd favors instead a collaborative approach to these issues as proposed in Stipulation II.

12. <u>New Jersey Commercial Users</u>

NJCU, a signatory to the Stipulation, simultaneously filed its comments in support of the Stipulation and its response to Stipulation II. NJCU asserts that the provided rate reductions in the Stipulation are consistent with NJCU's litigation position that rates be reduced by 13.4% from current rates, the findings of the ALJ that PSE&G's rates be reduced by 10-12%, and the Act's requirements that rates be reduced initially by at least 5% from current rates, and by at least 10%

from April 30, 1997 rates within 36 months. NJCU indicates that it shares the RPA's concerns as reflected in Stipulation II with respect to a potential rate spike in year five.

With regard to shopping credits, NJCU takes issue with the RPA's assertion that the Stipulation II shopping credits "closely approximate" the PECO shopping credits. NJCU asserts that the substantially higher Stipulation II residential shopping credits come at the direct and sole expense of the shopping credits for small businesses, an approach which it maintains is inconsistent with the PECO credits and which will assertedly adversely impact the ability of small businesses to realize savings by shopping. Moreover, NJCU finds the price increases made in the competitive energy marketplace to be "very troubling" and inconsistent with the goals of restructuring. NJCU specifically points to the assertions via affidavit by MAPSA that shopping credits must be increased above the PECO levels to reflect higher wholesale power costs. NJCU asserts that such developments are inconsistent with the goals of restructuring as embodied in the Board's Final Report and in the policy declarations in the Act, specifically that it is the policy of this State to "place greater reliance on competitive markets, where such markets to exist, to deliver energy services to consumers in greater variety and at lower cost than traditional, bundled public utility service." N.J.S.A. 48:350(a)(2). It postulates that the early results of competition in Pennsylvania which assertedly have resulted in significant increases despite offsetting reductions, may suggest that marketers are reaping a disproportionate share of the benefits of competition.

NJCU notes that the rate unbundling provisions in the Stipulation reflect and resolve the concerns with respect to the PSE&G filing which NJCU raised during the litigation phase and with which the ALJ concurred in the I.D., specifically, to eliminate the significant intra-class cost impacts in the initial unbundling and instead achieve intraclass neutrality; to develop an explicit MTC as opposed to an implicit MTC; and include a market capacity credit in addition to a market

energy credit. These provisions are also consistent with the provisions of the Act, according to the NJCU. It also notes that the Stipulation reflects an adjustment to the 1995 cost of service study which reduces the cost of capital to 9.5 percent to reflect reduced risk associated with the distribution function, which produces a $20 million reduction.

With regard to stranded costs, NJCU asserts that, with one exception, the Stipulation is consistent with its litigated position that there either be a direct sharing of stranded costs or an indirect sharing via implementation of a minimum 10% base rate reduction. The Stipulation, by reducing the stranded cost recovery opportunity from $3.9 billion as requested, to $3.075 billion, produces a 20% reduction in the requested amount. Moreover, such recovery is not guaranteed, while any overrecovery will be returned to ratepayers. NJCU did reserve in the Stipulation its right to challenge the tax treatment on securitization. It does not dispute that there may be certain tax liabilities associated with securitized stranded costs; however it concurs with the position expressed in Stipulation II that actual taxes associated with the transition bonds should be collected through a separate MTC, subject to true-up, rather than through the transition bond charge. With regard to the Genco transfer, NJCU recognizes that reasonable parties ran disagree, but believes that the assigned transfer value is within the range of reasonableness and is therefore acceptable. NJCU further notes that, through oversight, paragraph 30A of the Stipulation does not reflect its agreement with the affiliate code of conduct espoused by Enron.

13. Tosco

Tosco, a signatory party to the Stipulation, asserts that the Stipulation represents a full and fair resolution of this matter and will provide for necessary finality and expeditious decision, and that any re-opening of the record, as suggested in Stipulation II, will virtually insure delay such that retail choice will not be implemented by August 1, 1999, as required by law. It argues that competitive markets, asset

valuations and restructuring activities are evolving on a continuing basis; if that were the basis for reopening, the record would never close. It submits that the record position of PSE&G has been substantially modified because there is a true cap on all bill elements and accelerated rate reductions for all customers; there is a shopping credit at the very top end of a reasonable range; there are reductions in stranded costs of $0.825 billion; and there is true restructuring, with generation going out to bid on a competitive basis in year four. It also notes that through. legislative resolution, on-site generation is enabled to develop without exit or like fees.

14. Independent Energy Producers of New Jersey

IEPNJ, a signatory party to the Stipulation, asserts that the Stipulation succeeds on several fronts, by providing rate reductions of nearly 14%; providing shopping credits well ahead of those in New England and in line with those in Pennsylvania- providing a reasoned approach to the treatment of stranded costs; providing a framework for the development of a competitive market; and complying with all provisions of the Act. It notes that PSE&G has abandoned a claim to recover over $570 million of stranded costs, including significant investment in upgrades and repairs at the Salem nuclear plants, which significantly contributes to the rate reductions being offered, and that PSE&G is also at risk for recovery of the $600 million of unsecuritized stranded costs. It maintains that the Stipulation provides a road map to a competitive energy market by transferring generating assets to a separate, competitive arm of the PSE&G holding company, including the development of accounting protocols and a code of conduct to govern relationships between PSE&G and Genco, with no preference to be offered by PSE&G to Genco. In this regard, IEPNJ recommends adoption of the affiliate code of conduct language proposed by Enron as reflected in paragraph 30A of the Stipulation.

15. Enron

Enron, a signatory to the Stipulation, recommends its adoption as being consistent with the intent of the Act and supported by the record in these proceedings. Enron also notes that the level of shopping credits is consistent with the testimony of Enron and other witnesses during the OAL proceedings who testified in support of shopping credits at levels which will establish a robust competitive marketplace; that the shopping credits in the Stipulation are among the highest in the country; and that the Stipulation is also consistent with the ALJ's recommendation in establishing a 2 mill per kwh adder. Enron also supports the provision in paragraph 36 of the Stipulation wherein the parties agree to work cooperatively to conclude the metering and billing proceeding in an expedited fashion, no later than May 1, 2000, as compared to the legislative requirement in section 6 of the Act, N.J.S.A. 48:3-54, that such proceeding be completed by August 2000. Finally, Enron supports the affiliate relations standards language set forth in paragraph 30A of the Stipulation.

16. Rockland Electric Company

RECO, which was not a signatory to either the Stipulation or Stipulation II, takes no position either in support of or in opposition to the Stipulation. RECO emphasizes that the Board's ultimate decision, in its pending restructuring-related proceedings must be based on the merits of a RECO-specific stipulation or an evaluation of the record evidence submitted to the ALJ and the Board in those proceedings. The PSE&G decision or components thereof should not bind RECO nor be evidentiary with respect to resolution of RECO's proceedings, nor should it be considered a "threshold" for settlement discussions in RECO's proceedings.

17. National Energy Marketers Association

NEMA, a trade association of wholesale and retail marketers of electricity, which was granted participant status in the restructuring proceedings by the Board by Order dated July 30, 1998, was not a signatory to either the Stipulation or Stipulation II. NEMA asserts that the Stipulation falls short of the goals in both the Board's Final Report and in the Act. NEMA is specifically concerned with regard to the valuation and transfer of generation assets, and the development, cost allocation and proper valuation of shopping credits for each ratepayer class. NEMA submits that proper generation asset valuation is critical to a competitively neutral, price-competitive marketplace, particularly in light of a transfer to an unregulated affiliated entity. Absent an actual sale, NEMA is concerned that the valuation placed on the assets based upon an administrative estimate may be understated, and that such undervaluation not only increases stranded costs, but unfairly subsidizes a competitive advantage for the entity receiving the undervalued asset.

NEMA asserts that shopping credits have been used in early stages of restructuring as a proxy for the complete unbundling of otherwise bundled utility generation services. If shopping credits are set too low, competition will not occur, consumers will not be able to experience savings, and competitive suppliers will not participate in the New Jersey market nor make long term investments in infrastructure.

NEMA contends that the level of shopping credits in the Stipulation do not properly value the assets and services to be replaced by competition, and are therefore inadequate. NEMA submits that shopping credits developed using actual or projected costs do not reflect the full unbundled cost of generation and related services; consequently the Stipulation's shopping credits undervalue the true cost to ratepayers for these services. It also argues that the shopping credits are also significantly understated relative to both today's market values as well as any reasonable forecast of future market values.

NEMA proposes that the Board commit the parties to reconvene settlement discussions, to address the proper determination of stranded costs implicit in the transfer of generation assets, the development of affiliate rules and codes of conduct, and the development of shopping credits that more accurately reflect the full regulated costs of generation and related services.

18. Exelon Energy

Horizon Energy Company, d/b/a/ Exelon Energy is a marketer/aggregator that provides electric service to retail electric customers throughout Pennsylvania and currently provides natural gas service at retail in New Jersey, and Exelon Management and Consulting is a broker that facilitates transactions between buyers and sellers of energy. A subsidiary and division, respectively, of PECO Energy Company, they are referred to collectively as Exelon. Exelon moved to intervene in the restructuring proceeding on February 4, 1999 and was granted participant status by the Board on March 18, 1999. Exelon asserts to have a substantial interest in the proceeding and submitted comments addressing both stipulations, with respect to certain issues that assertedly are critical to the creation of a competitive retail electricity market. Exelon maintains that the shopping credit is the most critical factor in creating a viable competitive retail electricity market; if the credits are too low, customers, particularly residential, will not shop because the low level of savings will not justify the customer's time and effort evaluating offers and selecting a supplier. The highest level of residential customer interest in Pennsylvania is in PECO's service territory, which has the highest residential shopping credit. It submits that the shopping credit levels in Stipulation II reflect credit levels that are necessary in New Jersey to create competition. Exelon also suggests that transmission costs should be backed out of the shopping credit to avoid confusion, or that PSE&G should be required to commit to the transmission rates that are incorporated into the shopping credits. Exelon supports Enron's alternative Code of Conduct

as set forth in paragraph 30A of the Stipulation. With regard to Attachment 6 to the Stipulation, Exelon identifies a number of proposed tariff revisions which it maintains are either contrary to the Act or not in the public interest.

B. Comments on Stipulation II

Comments on Stipulation II, to the extent not jointly included in comments previously submitted in response to the Stipulation, were submitted by the following parties: RPA, PSE&G, MAPSA, NJBUS, IEPNJ, GPU and ACE. These comments are summarized below.

1. Division of the Ratepayer Advocate

The RPA's comments in support of Stipulation II repeat many of the key elements and rationale for the proposal which were included in the original submission and summarized previously, and thus will not be repeated at length here. In short, the RPA asserts that Stipulation II is superior to the Stipulation because it does a better job of balancing all of the interests, as it will allow customers to save additional money through a vibrant competitive market; achieve sustained rate reductions beyond year four; and will allow PSE&G to recover and securitize a "generous" level of stranded costs and to earn a fair return, thus maintaining the Company's financial integrity. The RPA submits that the Board must balance the interests of ratepayers in terms of rates and service with the interests of the utility in maintaining its financial integrity, and must include in its review the policies embodied in the Act. The RPA argues that Stipulation II achieves the appropriate balance of these goals and interests, with appropriate deference to the Act's mandate for rate discounts and the establishment of a competitive energy marketplace.

In support of its assertion regarding the impact of Stipulation II on PSE&G, the RPA points to its testimony in the proceedings which it asserts demonstrated that PSE&G could reduce its rates by 18.9% from current levels (15% from April 30, 1997 rates) for the duration of the then-

proposed seven year transition period, not including the savings from securitization, and to the ALJ's findings that PSE&G could reduce its rates by 10-12% over seven years and maintain its financial integrity. It asserts that the rate reductions proposed in Stipulation II are substantially below and of a shorter duration than both the RPA's initial proposal and the ALJ's recommendation, that the level of stranded cost recovery and securitization in Stipulation II are substantially higher than in its litigated case, and that PSE&G's financial condition has improved since these proceedings began as supported by an attached affidavit from its witness Rothschild. Mr. Rothschild asserts, among other things, that Wall Street analysts are predicting positive earnings potential for PSE&G's parent company, Public Service Enterprise Group ("PEG"), which would produce, if achieved, a return on equity of 11.9% to 12.7% for PEG, which is higher than the return found reasonable by the ALJ in this matter; that there has been a substantial run-up in PEG's common stock price over the past two years; and that debt costs have declined by 50 basis points since the period of time analyzed in the record. All of these factors, it is asserted, lead to the conclusion that rates could be reduced another 6.75% beyond the rate reductions in Stipulation II and be absorbed by what would otherwise be "excess earnings." Therefore, he submits that the Company will be able to maintain its financial integrity throughout the six years encompassed by Stipulation II.

The RPA further asserts that Stipulation II's proposed treatment of the Genco transfer is far more balanced and appropriate than what is proposed in the Stipulation.

2. PSE&G

PSE&G asserts that Stipulation II should be rejected. It maintains that Stipulation II is not a "stipulation" at all since it is not the product of negotiations between adverse parties but rather a joint effort by parties with similar positions to

reiterate their litigation positions. PSE&G further asserts that Stipulation II is, in effect, a new motion to reopen the record, which the Board has previously denied. PSE&G argues that to the extent Stipulation II constitutes a new motion to reopen, it is barred by the doctrines of Res Judicata and the Law of the Case. PSE&G further argues that Stipulation II inappropriately relies upon inadmissible hearsay affidavits containing extra-record materials, the nature of which the Board has already properly determined it will not consider. PSE&G further argues that the cases cited by Stipulation II regarding the alleged need for further evidentiary hearings are wholly inapplicable.

PSE&G asserts that the rate reductions cannot be sustained as proposed in Stipulation II without securitization. PSE&G submits that subsections 14(a) and 4(i) of the Act, N.J.S.A. 48:3-62(a) and N.J.S.A. 48:3-52(i), contemplates that securitization will provide a source for the funding of rate reductions; however Stipulation II, while suggesting that the rate reductions not be tied to securitization, offers no reasonable alternative source of funding. Moreover, PSE&G argues, Stipulation II ignores the fact that if PSE&G cannot securitize $2.475 billion of stranded costs, it would be forced to recover that amount via an MTC, which would require recovery of $620 million per year, plus a return on the unamortized balance and taxes during the transition period, which would actually produce a rate increase.

PSE&G notes that the proposed extension of rate reductions to distribution rates in years five and six and beyond in Stipulation II is not achievable. PSE&G notes at the outset that the basis for this extension is primarily provided via the affidavit of a new consultant, Mr. Rohrbach, who assertedly relies on hearsay information, is unfamiliar with the relevant testimony and record, and ignores or disregards that record, producing errors and misassumptions. The four alleged sources of rate reductions in years five and six and beyond are addressed by PSE&G as follows: First, Stipulation II claims that $290 million will be available from

the use of 60% of the distribution depreciation reserve of $569 million. This ignores the fact, as reflected in the record, and consistent with the Stipulation, that all of the depreciation reserve is relied upon in assisting the funding of stranded costs and achieving the rate reductions during the Transition Period; accordingly none of the depreciation reserve will be left to fund rate reductions in years five and six. Second, Stipulation II proposes to use $35 million of expiring amortizations to offset rate increases. In fact, these amortizations, which terminate in 2000, are already included as a source of funding for the rate reductions in the Stipulation. Moreover, while Stipulation II assumes a gross-up of the expired amortizations to come to a pre-tax value of $63 million, PSE&G contends that this ignores the record evidence that the amortization value of $35 million is already a grossed-up amount. Third, Stipulation II utilizes $90 million of stranded costs related to the Salem generating plant as reflected in the Stipulation to fund additional rate reductions in years five and six. While the ALJ concluded that all Salem capital additions were appropriately included in stranded costs, PSE&G agreed to a $90 million disallowance, which has already been accounted for as part of the $225 million reduction in the recovery of stranded costs from $3.3 billion to $3.075 billion. Fourth, Stipulation II calls for the use of an alleged $90 million LEAC overrecovery to support future rate reductions. PSE&G states that this number is an error, the amount of the overcollection which is relevant is $60 million, not $90 million, and that this LEAC overrecovery is already accounted for in the Stipulation as part of the aforementioned $225 million reduction in recovery of eligible stranded costs.

PSE&G cites additional errors and/or misassumptions in the analysis underlying Stipulation II's rate reductions in years five and six. First, Stipulation II states that the reductions it proposes in years five and six will require rates to be reduced by $900 million over the two year period. In reality, at the recommended 14.05% rate reduction during years five and six, set forth in Attachment B, Table 2 of

Stipulation II, the real value of such reductions would be over $1.2 billion according to PSE&G. Second, Stipulation II provides that certain categories of available sources for reductions in years five and six should be grossed-up for taxes. Specifically, the "balance in distribution depreciation adjustment" in Attachment B, Table 1 is erroneously grossed-up, since it applies to a number which is already pre-tax. Combined with the aforementioned tax grossed-up error on the expiring amortizations, PSE&G asserts that these two errors alone result-in Table I of Attachment B overstating potential sources of funds by $144 million. Third, Stipulation II alleges that the Stipulation understates the savings from securitization because it does not extend the calculation of the benefits of securitization beyond the transition period. PSE&G asserts that this is a "regurgitation" of the RPA witness Dirmeier's testimony in the proceeding which was already addressed and rebutted via its witnesses, Murray and Krueger. In fact, because securitized bonds permanently replace higher cost capital, there is a permanent reduction in revenue requirements accompanying the lower bond payments, the net effect of which is a long term savings which does not expire at the end of the transition period. Fourth, Stipulation II assumes further rate reductions from growth in kwh sales. However, according to PSE&G, this totally ignores the fact that the Stipulation already accounts for the sales growth effect during the transition period which reduced the securitization charge. Fifth, Stipulation II recommends that rates stay at the same reduced level in year seven and thereafter unless PSE&G proves the need for an increase in a rate case. PSE&G points out that for a distribution company with $830 million in revenues, to keep rates reduced by approximately $600 million per year would require more than a rate case; it would destroy the Company financially and/or lead to substantial workforce reductions and threaten service quality.

PSE&G emphasizes the alleged absurdity of Stipulation II by pointing to the unbundled rates it would produce at the end of the transition period. The average shopping credit

would be 5.4 cents, or 60% of the bill, as opposed to a distribution rate of 2.03 cents, or 20% of the bill; yet Stipulation II recommends that additional rate reductions come from the distribution business rather than through other parts of the rate. This proposal in Stipulation II would result in the relatively small distribution company subsidizing marketer profits. PSE&G further points out that the affidavit of Mr. Rohrbach supporting the Stipulation II rate reductions, which represents that he participated in the PECO settlement discussions, expresses concern with a possible increase in PSE&G's 2003 rate from 9.0 to 9.96 cents, while the PECO rate in 2003, which he participated in establishing, will be 9.96 cents.

PSE&G further asserts that Stipulation II's claim that it provides an opportunity to recover the same amount of stranded costs as the Stipulation, is false. In fact, as evidenced by Attachment A to Stipulation II, the Company will only be given an opportunity to recover $268 million of unsecuritized stranded costs. Moreover, according to PSE&G, while Attachment B Table 1 to Stipulation II creates the impression that PSE&G has $4.3 billion dollars available to cover its stranded costs, other than the listed items concerning securitization (the value of which is assertedly overstated) and the distribution depreciation amortization (listed as available only in the amount of $170.35 million), none of the listed "opportunities" are in fact available for stranded cost recovery. First, PSE&G argues that Stipulation II's proposal to disallow one-half of bond issuance and transaction costs, leading to an effective reduction in stranded cost recovery of $62.6 million is not supported by the Act or the evidence. Second, PSE&G takes issue with Stipulation II's retention of a 7.3 mills per kwh retail adder for-those customers who do not shop, totaling a $54.64 million contribution to stranded costs. PSE&G asserts that the proposed 7.3 mill adder is unsupported in the record, and cannot be relied upon. Third, Stipulation II relies on the retention by PSE&G of 40% of the net present value of the distribution depreciation amortization, or $170.35 million, as

a contribution towards stranded cost recovery. PSE&G maintains that the record in the case demonstrates that all of the depreciation amortization will be needed to fund stranded cost recovery and the rate reductions, and will not be available to pay for rate reductions in years five and six. Fourth, Stipulation II identifies the "Genco Transfer Premium" as an additional stranded cost recovery opportunity. In fact, PSE&G asserts there is no such premium; the proposal in Stipulation amounts to nothing more than a $600 million-disallowance of stranded costs based upon a superficial plant value analysis. Fifth, Stipulation II purports to allow the Company to retain $43 million in "non-credited cost reductions" which would otherwise be passed through to customers via rate reductions, for stranded cost recovery. PSE&G asserts that the alleged savings to be used to fund the proposed rate reductions in years five and six will not, in reality, be available for such purposes, because they are already being relied upon to fund the rate reductions during the transition period or stranded cost recovery.

Finally, PSE&G notes that Stipulation II identifies $828 million of "mitigation opportunities" as additional "stranded cost recovery opportunities." PSE&G asserts that these alleged mitigation opportunities, originally proposed by the Auditors, were unfounded and explicitly rejected by the ALJ in his I.D. Moreover, PSE&G contends that use of the $828 million is in error for three reasons: 1) it is a pre-tax number; it would have to be reduced to $330 million to bring it to a net-of-tax basis consistent with the stranded cost amount; 2) approximately half of this amount is related to generating facilities and accordingly these mitigation savings have already been reflected in the reduction of stranded costs from $3.9 billion to $3.3 billion; and 3) a portion of these savings relate to transmission rates which are regulated by the FERC. Correcting these alleged errors reduces the claimed $828 million of mitigation to less than $250 million, which is far less than the amount of stranded cost recovery for which PSE&G is at risk, since it has already agreed to cap

unsecuritized stranded costs at $225 million less than the total, and because the primary source of the opportunity is via the retail adder, which PSE&G loses as customers switch suppliers. PSE&G claims that assertion in the Mr. Dirmeier's affidavit attached to Stipulation II, that the Company is not at risk for the $600 million, is in error since he fails to account for income taxes associated with the depreciation reserve amortization and thereby overstates stranded cost recovery by approximately $100 million (from $458 million to $357 million). In addition, PSE&G claims that the contribution to stranded cost via the retail adder is overstated in Mr. Dirmeier's affidavit, since it relies on a very low shopping rate which is not even consistent with the shopping rate assumed in Mr. Rohrbach's affidavit attached to Stipulation II. When these errors are corrected, the actual retention rate from the depreciation amortization and the retail adder is asserted to be $456 million, or 76% of the $600 million, not the erroneous 96%.

Contrary to the assertions of Stipulation II's proponents, PSE&G asserts that the generation asset transfer is discussed and supported in the record. It maintains that there was extensive testimony regarding the need for separation of generation from the utility, as well as the value of the assets, and the benefits of removing the risk of nuclear operations from ratepayers. Moreover, contrary to the suggestions by Stipulation II's proponents, subsection 7(d) of the Act, N.J.S.A. 3-55(d), specifically contemplates the transfer of assets from a utility to a related competitive business segment of the holding company. PSE&G contends that efforts in affidavits attached to Stipulation II to show the $1.768 billion asset valuation too low are flawed, because they rely on hearsay information and a third party report, and because no attempt was made to assess whether any of the data from recent sales is relevant to the specific PSE&G plants being transferred. With regard to the proposal in Stipulation II regarding Codes of Conduct, PSE&G asserts that the proposal assumes market power which has not been proven or found, would render Genco a State-regulated generation company

limited to electronic bulletin board transactions, intrudes on FERC-jurisdictional issues, and is inconsistent with the Act. PSE&G asserts that Board regulation of affiliate transactions should be limited to ensure that there is no cross-subsidization or improper exchange of "restricted information."

PSE&G further asserts that, contrary to those in Stipulation II, the shopping credits proposed in the Stipulation are supported by record evidence (Exhibit EN-35(R), pp. 10-13; RA-35, pp. 3-5), and will encourage competition, while avoiding burdening customers who remain with PSE&G from subsidizing those who choose other suppliers, and maximizing rate reductions. The Stipulation's shopping credits are fixed, not floating as originally proposed by PSE&G, which marketers testified would be helpful, and they are market based and include a reasonable retail adder. PSE&G contends that the record shows that rate reductions cannot be achieved if the shopping credit is increased unduly. PSE&G further asserts that the "eleventh hour" attempt to increase shopping credits from the range in the Stipulation (5.03 to 5.10 cents) to 5.40 cents is based on erroneous and untimely assumptions and arguments. The assertion that suppliers will be unable to deliver savings at the Stipulation's "too low" shopping credit levels is undermined by Stipulation II's own supporting affidavits, which claim that the PECO shopping credits have led to a vibrant competitive marketplace. PSE&G points out that the PECO shopping credits are, on average, virtually identical to those in the Stipulation, that suppliers in PECO are facing the same PJM region market conditions as will be experienced in New Jersey, and that the PECO shopping credits have not been increased to reflect alleged changes in market conditions as is being proposed here. Yet, according to Stipulation II's own proponents, the PECO marketplace is successful and PSE&G notes that the record in this proceeding includes testimony extolling the virtues of the Pennsylvania shopping credit. Moreover, PSE&G points out that one of MAPSA's members sponsored public testimony by former by former Pennsylvania PUC Commissioner Hanger before the New

Jersey Senate Committee considering restructuring legislation on November 12, 1998, stating that "Given present market conditions, New Jersey will not create competition for residential and small commercial customers unless the residential shopping credit is approximately 5.0 to 5.5 cents per kwh." The residential credit in the Stipulation, which Stipulation II's proponents claim is too low, is 5.86 cents, and no one has alleged that market conditions today differ from November 1998. Moreover, the alleged differences in cost between Pennsylvania and New Jersey which necessitate a higher credit than PECO amount to only about 1 mill per kwh; yet the Stipulation's average shopping credit is this much higher than the PECO credit already.

PSE&G contends that the remainder and majority of the proposed adjustments to increase the Stipulation's shopping credits come from the unsubstantiated market price increase. PSE&G also asserts that there is no assurance that increased shopping credits will result in any savings to customers, as opposed to being retained by marketers as additional profits or to cover inefficient marketing or administrative costs. PSE&G takes issue with additional assertions in the affidavits attached to Stipulation II. While there is an assertion that shopping credits must be increased to 5.40 cents for PSE&G customers to receive the same rate discounts that PECO customers enjoy, in fact, the Stipulation provides shopping credits nearly identical to, and in fact slightly higher than, PECO'S, while regulated rates for PECO will be increasing over the next few years, and PSE&G's will be decreasing. PSE&G also contends that the retail adder proposed in the Stipulation II is unsubstantiated and could have been presented for cross-examination in the case, but was not. It also argues that the claim that the Stipulation's shopping credit is more like the California and Massachusetts credits than like PECO is simply wrong: the record established that the California credit is a floating credit with no retail adder, as initially proposed by PSE&G, and that the Massachusetts credit was below market wholesale prices. The Stipulation's

credits are fixed, not floating, like PECO'S, and are almost identical in magnitude to PECO'S.

3. MAPSA

MAPSA's comments repeat the arguments accompanying and in support of the original filing of Stipulation II, and point to the support of the "huge majority" of PSE&G customers and government organizations[8] that will be directly affected by this matter as an indication of Stipulation II's superiority over the Stipulation. The MAPSA comments also include a supplemental affidavit by Mr. Rohrbach purporting to explain in further detail certain financial calculations, the impact of the shopping credit on PSE&G's cash flow, the rationale for the higher shopping credits proposed in Stipulation II.

The affidavit is argued to demonstrate that the financial impact on PSE&G associated with the higher shopping credits in Stipulation II would be "negligible." MAPSA's affidavit asserts that the nominal cost to PSE&G associated with the higher shopping credit, assuming shopping percentages ranging from 15%-25% for residentials to 100% for large industrials, is under $18.6 million per year; however, it is asserted that Genco can sell 50% of the power freed up by customers leaving BGS into the forward market at higher prices, thereby offsetting the net impact of the shopping credit by $6 million per year, to $12.6 million annually. MAPSA also asserts that the higher shopping credits will primarily benefit customers, through the opportunity for savings because in a competitive retail marketplace, marketers will not be able to retain a portion of the shopping credit as enhanced profits, but will have to pass the savings along to customers.

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[8] On March 30, 1999, the New Jersey State League of Municipalities sent a letter to the Board expressing its "unqualified support" for Stipulation II.

4. New Jersey Business Users

NJBUS reiterates the key reasons as to why, in its view, Stipulation II is preferable to the Stipulation. NJBUS asserts that Stipulation II provides a fair resolution of all the key areas of these proceedings, while at the same time agreeing for the purpose of settlement, to resolve many of the issues in a manner preferred by PSE&G. NJBUS points out that the rate reductions embodied in Stipulation II are identical to those provided in the Stipulation, and asserts that if Stipulation II is adopted, it would waive its objection to the "pre-funding" of 1 % of the securitization implicit in the rate reduction schedule, as well as its objections to the initial 5% reduction being taken from current rates rather than April 30, 1997 rates. Stipulation II also incorporates the implementation of the rate reduction per the PSE&G proposal, that is, via a restructuring rate reduction line item. However, NJBUS cautions that this mechanism will lead to an automatic rate increase of up to 13.9% after the transition period; Stipulation II essentially eliminates this rate shock by applying cost savings to which ratepayers are entitled, and which would otherwise be realized by shareholders under the Stipulation. Absent a settlement, NJBUS asserts that subsection 4(f) of the Act, N.J.S.A, 48:3-52(f), would require that rate reductions come from unbundled rate elements, rather than from credits applied to customers' bills. NJBUS accepts the restructuring rate reduction line item as allocating rate reductions in a fair manner to all customers, provided that increases in years five and six are eliminated.

NJBUS asserts that the Act does not permit securitization at the $2.475 billion level, but it agrees to waive its objection to this level in the interests of settlement based on either the mitigated stranded cost level available for recovery as calculated by PSE&G ($3.075 billion) or by Stipulation II ($2.475 billion). With regard to PSE&G's proposal to include $125 million of bond issuance and transaction costs as part of stranded cost recovery through securitization. NJBUS asserts that it is fairer to ratepayers that PSE&G be required to share

the 50% of the bond transaction costs, as proposed in Stipulation II. NJBUS also asserts that Stipulation II is superior to the Stipulation because it properly recognizes the full market value of the Company's owned generation plants. NJBUS maintains that the $600 million of unsecuritized stranded costs can be reduced to zero by properly crediting ratepayers with the $600 million attributable to the above net book market value of the generating assets. NJBUS notes that Stipulation II's agreement to allow the immediate transfer of PSE&G's generating assets, and thereby waive the protection of an ongoing review and true-up of the amount of stranded costs, is contingent on valuing the assets at $2.9 billion ($2.4 billion net of taxes), as compared to the asset transfer value of $1.768 billion implicit in the Stipulation. NJBUS states that the $2.9 billion asset value is based upon a November 12, 1998 report of Resource Data International, Inc. which sets forth average market recoveries for 35,000 MW of generation plant sales nationally over the prior 18 months. It asserts that subsection 11(d) of the Act, N.J.S.A. 48:3-59(d), requires that the full market value of the assets be credited to offset stranded costs.

Finally, NJBUS reiterates the arguments presented in the Stipulation II filing and summarized above with respect to the need for the higher shopping credits in its proposal.

5. **Independent Energy Producers of New Jersey**

IEPNJ opposes the adoption of Stipulation II, and reaffirms its support for the Stipulation. In its view, Stipulation II reflects an effort to "cherry pick" the ideal solution on every issue, and is ultimately illusory and unobtainable and, indeed, disingenuous in many respects. IEPNJ maintains, that Stipulation II was crafted in a vacuum, without regard to the record developed in this matter and without an effort to reconcile the diverse interests of the parties. While Stipulation II incorporates the elements of the Stipulation concerning recovery of NUG costs in an NTC, IEPNJ points out that it has no "better choice" than to accept these terms for NUG cost recovery since they are required by

the Act as well as by a prior Third Circuit Court decision. However, IEPNJ asserts that the RPA attempts to "tweak" the legislative guarantee of full recovery of NUG contract costs by arguing that PSE&G should be required to maximize the market value realized from the resale of purchased NUG power and thus mitigate stranded costs, and that PSE&G should attempt to mitigate, in particular, the NUG contracts held by its own affiliates. IEPNJ argues that such efforts to impose a mandatory mitigation obligation on PSE&G are inconsistent with the Act and with applicable case law.

6. Jersey Central Power & Light Company, d/b/a GPU Energy

GPU, which was not a signatory to either stipulation, addresses certain procedural aspects of Stipulation II, but does not discuss any of the specific terms that might be included in any Board Order resolving this matter. GPU argues that Stipulation II should not be considered a competing settlement proposal but, rather, should be regarded as simply joint comments on the Stipulation, or a position paper, rather than a competing settlement proposal. It submits that there can be no true settlement reached that does not include the Company, the primary moving party to the case, particularly when the outcome of the case will primarily and directly impact the financial Condition of PSE&G. It notes that conversely, the goals of the parties to Stipulation II, whose interests are all more or less aligned on the same side of the issues, can be achieved essentially without cost to any of those parties, and accordingly, unlike PSE&G, the parties to Stipulation II have few practical restrictions in striking a deal which serves their own interests, without taking into account the impact on PSE&G. PSE&G argues that, by definition, such a one-sided "settlement" cannot be viewed as such in the true sense of the word, since it is devoid of the type of give-and-take compromises that are the essence of a true settlement, and thus, it should not be accorded the weight of a true settlement.

7. **Atlantic City Electric**

ACE, which was not a signatory to either stipulation, neither endorses nor opposes the adoption of the Stipulation, but opposes adoption of Stipulation II, since the principles underlying Stipulation II could have adverse consequences for other utilities, including ACE. ACE submits that the proposals in Stipulation II are not supported by the record, and that their adoption would violate the parties' due process rights. It further contends that Stipulation II includes arbitrary shopping credits set based upon the wishes of large energy marketers and not on the costs of providing basic generation service. As well in its view, the proposal rests on improper interpretations of the Act with regard to securitization and rate reductions. ACE objects to a utility being forced to reduce its stranded cost recovery in order to fund an arbitrarily; set shopping credit, as it maintains is the case with the credits embodied in Stipulation II.

DISCUSSION AND FINDINGS

As noted above, since the close of hearings in these proceedings, the New Jersey State Legislature passed, and on February 9, 1999 Governor Whitman signed into law, the Electric Discount and Energy Competition Act, N.J.S.A. 48:3-49 et seq. The Act in numerous areas sets forth explicit directives with respect to the implementation of electric retail choice and, during the Transition Period, the Act establishes minimum aggregate rate reductions for electric public utilities. It also provides specific guidelines and parameters for the Board to follow with respect to a myriad of restructuring related issues, but in many areas leaves important decision-making details to the expertise of the Board consistent with those guidelines and parameters. The act requires that each electric public utility submit rate unbundling, stranded cost and restructuring filings to the Board, in a form to be determined by the Board, and it explicitly provides that filings submitted and proceedings conducted prior to the Act's effective date satisfy such requirements, provided that the Board shall take such actions

as may be necessary, if any, to ensure that the requirements of the Act are met in all regulatory actions related to the Act which were commenced prior to its enactment. N.J.S.A. 48:3-98. The Board **HEREBY FINDS** that this requirement of the Act has been met and that the filings submitted and the proceedings conducted prior to the Act's effective date were thorough and complete and provide an adequate record, and therefore satisfy the Act's requirements.

As summarized in some detail hereinabove, the Board has, by virtue of the issuance of its April 30, 1997 Order adopting and releasing the Final Report and the subsequent Board-directed electric public utility filings on July 15, 1997 and ensuing hearings at the OAL and before the Board, caused to be developed an extensive evidentiary record in these proceedings, and has provided substantial opportunity for public input in both the development of its policy findings and recommendations as set forth in its Final Report, and in the subsequent Board-directed rate unbundling, stranded cost and restructuring filings and related proceedings. As noted above, twenty days of evidentiary hearings were held at the OAL on the stranded costs and unbundling issues, and an additional twenty days of evidentiary hearings were held before Commissioner Armenti on the restructuring issues.

In reviewing the voluminous record before us, it is clear that many of the significant aspects of and issues in these proceedings are factually interrelated, with the outcome of one materially impacting decisions in other areas. This is particularly the case with respect to the level of rate reductions, the level of stranded costs, the level of shopping credits, and the various components of unbundled rates. In transmitting these matters to the Office of Administrative Law, the Board, in anticipation of the enactment of legislation in this area, requested that the Administrative Law Judges in this and the other electric public utility proceedings develop a broad record on stranded costs and unbundling issues and, specifically, with respect to the issues. of rate reductions, stranded costs and securitization, issue a range of

recommendations. With the passage of the Act, with its explicit directives and guidelines and parameters, the Board is now prepared to render decisions with respect to the subject issues in these proceedings in conformance therewith, based upon the record developed and comments provided, and in a time frame necessary to comply with the retail choice time line set forth in the Act.

We acknowledge and appreciate the efforts of ALJ McAfoos in presiding over the stranded costs and unbundling proceedings and in producing a detailed and thorough Initial Decision. In light of the enactment of the new legislation and the subsequent developments in the case as described hereinabove, we **HEREBY MODIFY** the Initial Decision as follows:

Subsequent to the close of hearings and the issuance of the Initial Decision, shortly after the Act was signed into law, and with the encouragement of the Board, as set forth in our February 11, 1999 Order, settlement conferences were held among the parties. These discussions ultimately led to a crystallization of the issues and the proffer of two alternative settlement proposals which are before us for consideration along with the Initial Decision and the evidentiary record developed before ALJ McAfoos and the Board. We are cognizant of the fact that each of the proposed stipulations before us is non-unanimous. Nonetheless, it is well-established that the Board may consider and rely upon non-unanimous stipulations as fact-finding tools so long as the Board independently examines the existing record and expressly finds that the stipulated rates yield rates that satisfy the statutory standards. I/M/0 Petition of PSE&G, supra at 270. We continue to believe that, in complex and technical cases such as this one, "the adversary parties themselves are often in the best position to work out the framework of a reasonable resolution of the issues." Id. at 259. We **FIND** that in the instant matter, all of the parties in this case were given an opportunity and, indeed were urged by the Board, by Order dated February 11, 1999, to participate in an attempt to

negotiate a settlement and we **FURTHER FIND** that all parties were given an opportunity, via the submission of written comments, to raise their concerns to the Board with respect to the alternative stipulations which were proffered to the Board for its consideration. Id. at 270. We **HEREBY REJECT** the contention of some of the parties in their comments that there is a need to reopen the record for additional evidentiary hearings in light of the passage of the Act and/or the content of the settlement proposals, essentially for the reasons set forth in our March 25, 1999 Order denying MAPSA's initial motion to reopen and supplement the record. We **FIND** that the evidentiary record before us as summarized hereinabove, is sufficiently comprehensive and detailed to allow us to fully consider all of the issues before us.

As stated in our Summary Order in this matter, and as will be explained below, based on our review of the extensive record in these proceedings, as well as the two alternative stipulations and the comments received thereupon, we **FIND** the PSE&G sponsored Stipulation to be, overall, more financially prudent and consistent with the Act's requirements and consistent with the record. We **FURTHER FIND** that with the modifications and clarifications to a number of key elements, as set forth in our Summary Order and amplified herein, the Stipulation can serve as a reasonable framework for a fair and reasonable resolution of these matters based upon and consistent with the record before us. Conversely, as described below, we **FIND** Stipulation II, sponsored by the Ratepayer Advocate and other parties, to be, in many significant areas, not supported by the record, reliant upon miscalculations and inappropriate assumptions or conclusions, and not reflective of a balanced consideration of all the issues in these matters. However, a number of specific and legitimate concerns have been raised by the commentors, including the proponents of Stipulation II, and where appropriate and as discussed below, these have been

addressed by the modifications and clarifications to the Stipulation set forth hereinbelow.

First, with regard to the issues of the magnitude of the rate reductions and the shopping credits, we note the following with respect to the provisions of the Act. Section 4 of the Act, N.J.S.A. 48:3-52, requires that as of August 1, 1999, each electric public utility must reduce its aggregate level of rates, inclusive of all unbundled rate components, by at least 5%. Section 4 of the Act further provides that the Board may adopt a schedule for the phase-in of additional rate reductions over the ensuing 36 months, except that, in any event, by no later than August 1, 2002, each electric public utility shall reduce its aggregate level of rates by at least 10% relative to the level of bundled rates in effect as of April 30, 1997 (since PSE&G received a 3.9% overall increase in rates subsequent to April 30, 1997 to recover DSM program costs this provision, in effect, requires a 13.9% reduction from current rates by PSE&G by no later than August 1, 2002), and each electric public utility shall sustain such final level of rate reduction for at least 12 months, through at least July 31, 2003. These provisions of the Act essentially establish a price cap under which all unbundled rate elements must fit during the four year period from August 1, 1999 through July 31, 2003. As such, to the extent one unbundled rate component is increased, all other things remaining equal, either one or more other unbundled rate components must be decreased, or the overall aggregate level of rate reduction must be reduced from what it otherwise would or could have been. This relationship is particularly relevant given the requirements and provisions of subsections 4(b) and 4(f) of the Act, N.J.S.A. 48:3-52(b) and (f), specifically those provisions which require the Board to establish shopping credits, applicable to the bills of retail customers who choose to purchase electric generation service from a duly licensed power supplier, at levels which, among other things, encourage the development of a competitive retail-supply marketplace, while at the same time providing and sustaining the required aggregate level of rate reductions. Put simply, under a price cap as mandated by the Act, once

the other unbundled rate components, including provisions for stranded cost recovery, are established, higher shopping credits would result in lesser rate reductions, and vice versa, absent a deferral of the recovery of costs into some future period. In a very real sense then, the Board is required by the Act to balance the achievement of two crucial, yet potentially conflicting factors. All other things being equal, a movement too far in one direction, in favor of larger shopping credits at the expense of lesser rate reductions, would benefit electric power suppliers and/or shopping customers, at the expense of customers who do not switch suppliers. Conversely, a move too far in the other direction in favor of lower shopping credits to achieve higher rate reductions would benefit non-shopping customers, while potentially inhibiting the development of a competitive market by making it less attractive for third party suppliers to enter the marketplace, thus resulting in diminished opportunities for customers to switch suppliers.

We **FIND** that the rate reduction schedule provided in the Stipulation meets the legislatively-mandated minimum rate reduction levels for August 1, 1999 and August 1, 2002, and, in fact, exceeds the minimum required rate reductions during the period from January 1, 2000 through July 31, 2002, by introducing additional phased-in reductions, which additional steps are permitted, but not mandated by the Act. These enhanced rate reductions, as set forth more fully below, support the level of bondable stranded costs found to be reasonable by the Board. Additionally, we **FIND** that the Stipulation, specifically the provisions of paragraph l(b) thereof, complies with the provisions of subsection 4(l) of the Act, N.J.S.A. 48:3-52(l), which require immediate and full passthrough of securitization savings to customers. We note, however, that the Stipulation inappropriately conditions the entire incremental rate reductions in January 2000, August 2001 and August 2002 on the implementation of the securitization bond charge. As noted previously, the 13.9% rate reduction in August 2002, as well as the 5% rate reduction in August 1999, are required minimum rate

reductions, and the imposition of the noted condition for these two rate reductions is clearly inappropriate. As discussed in more detail below, we believe, that if securitization is implemented, the two intermediate rate reductions should, at a minimum, be based on certain guaranteed levels even if the estimated savings from securitization are not fully realized. Should greater savings be achievable as a result of securitization as implemented, these additional savings shall be reflected in reductions beyond the requisite minimums.

Moreover, in our view, the level of the BGS rates/shopping credits embodied in the PSE&G Stipulation, while supported in the record and consistent with the provisions of subsections 4(b) and 4(f) of the Act, N.J.S.A. 48:3-52 (b) and (f), exceed those contemplated by many of the parties and indeed the ALJ when the rate reduction recommendations were made. The PSE&G proposal for a 6.7% rate reduction in its July 15, 1997 filing was accompanied by a proposal to set the BGS price at a level consistent with the forecasted 1999 PJM spot energy price. The Auditors' recommended rate reduction range of between 8.5% and 14% was premised on an audit of the Company proposal, including the PJM energy rate proposal for BGS and the shopping credit. As discussed above, the rate reduction proposals sponsored by several parties in the proceeding, including NJBUS, NJICG and NJCU, fell in the range of 10 to 12 percent.

It is clear that the record reflects a wide range of rate reduction proposals, and the ALJ himself recommends a range of rate reductions of between 10 and 12 percent which he finds will not unduly impair the Company's financial condition. The ultimate rate reduction step in the PSE&G Stipulation of 13.9% from current rates, which level is mandated by the Act, exceeds this range of reductions found reasonable by the ALJ. At the same time, the shopping credit levels in the PSE&G Stipulation are far in excess of the levels originally proposed by PSE&G. We note that the proposed 13.9% rate reduction in the Stipulation is to be phased in over

three years. We **FIND** that a phase-in is reasonable in order to provide PSE&G an opportunity for recovery of non-securitized stranded costs, as addressed below, while at the same time establishing the level of shopping credits provided in the PSE&G Stipulation. Nonetheless, even considering the phase-in, the average rate reduction for all customers over the entire four year Transition Period, as provided by the PSE&G Stipulation as modified herein, still exceeds nine percent, and additional savings are made possible by the shopping credit and retail adder, which brings the total available savings to in excess of 10 percent over the entire four year Transition Period. Considering the higher level of shopping credits, including the 2 mill per kwh retail adder embodied in the shopping credits proposed in the Stipulation, we **FIND** that the rate reductions in the proposed Stipulation fall within the range supported by the record and recommended by the ALJ. Moreover, we note and emphasize that, consistent with the provisions of subsection 4(h) of the Act, N.J.S.A. 48:3-52(h), these total rate reductions do not include the additional energy tax savings that customers will realize as a result of the Energy Tax Reform Act, P.L. 1997, c.162.

Further, we note that the provisions of subsection 4(j) of the Act, N.J.S.A. 48:3-52(j), require that the maximum level of rate reduction (in the case of PSE&G, 13.9% from current rates) be sustained until at least July 31, 2003. Accordingly it is appropriate, and we **FIND** it to be reasonable and consistent with the Act, that the Transition Period consist of the four year period from August 1, 1999, when the rate reductions begin, through July 31, 2003, at which time the mandated price cap expires and the Board may reset the aggregate level of rates.

We **FIND** that the higher levels and more extended period of rate reductions as proposed in Stipulation II are not supported by the record, and are indeed reliant on assumptions which are plainly incorrect. The proposed use of $290 million, representing 60%, of the distribution depreciation reserve amortization of $569 million as a source

of additional rate reductions is inappropriate, since the $569 million amortization is already embedded in the Company's petition, and fully utilized and relied upon in the ALJ's recommended range of rate reductions, as well as to partially fund the rate reductions and stranded cost recovery during the Transition Period embedded in the Stipulation. Use of a portion of this amortization in an attempt to justify further rate reductions in years five and six would result in an inappropriate "double-count" of this source of funds. Additionally, and as asserted by PSE&G in its comments, Stipulation II incorrectly relies upon the gross-up of $35 million of expiring amortization levels which, in fact, already represent grossed-up figures, and it also incorrectly relies upon a gross-up of the "balance in the distribution depreciation adjustment," which is applied to a number which is already grossed-up, thus representing two additional examples of "double-counting." We also conclude that use of $90 million in write-offs associated with the Salem generating plant to fund rate reductions in years five and six, as proposed in Stipulation II, represents yet another "double-count," since this write-off is already reflected in a reduction in the level of stranded cost recovery provided in the Stipulation, as modified herein. We do, however, concur with several of the comments and the proposal in Stipulation II and **FIND** that the actual LEAC overrecovery balance existing as of August 1, 1999, consists of funds overcollected from and appropriately returned to the ratepayers of PSE&G, with interest, and thus should be utilized for the benefit of customers, not the Company. However, we believe it more appropriate that this be accomplished by utilizing the overrecovered amount as an offset to the NTC deferred balance, rather than to justify and establish a specific level of rate reduction in years five and beyond as proposed by the RPA. By applying the LEAC overrecovery balance to the starting deferred NTC deferred balance effective August 1, 1999, these monies will be available, with accrued interest, to mitigate the impacts of recovery of any other deferred costs in year five and beyond.

Notwithstanding our finding that Stipulation II "double-counts" the expiring amortizations by grossing-up an already "grossed-up" number, we do believe that when the $35 million of amortizations indeed expires it can allow for additional rate reductions beyond those contemplated in the Stipulation and beyond those made possible because of the amount of bondable stranded costs authorized by this Order. Accordingly, we believe it appropriate that if securitization is implemented, the proposed 8.25% rate decrease on August 1, 2001 be increased by 0.75% to 9.0%. This figure, as well as the 7% January 1, 2000 rate decrease, shall be a guaranteed minimum decrease and shall not be contingent upon the achievement of any particular minimum level of savings from securitization.

With respect to the levels of shopping credits, it is plainly evident that the shopping credits embodied in the Stipulation are significantly higher than those proposed by the Company in its filing, and reflect consideration of the criticisms leveled at that proposal by the parties to this proceeding, as summarized hereinabove, some of which were found to have merit by the ALJ. The proposed shopping credits in the Stipulation reflect market capacity costs, in addition to market energy costs, and also include a retail adder as recommended by the ALJ. The market energy and capacity costs reflected in the shopping credits contained in the Stipulation are consistent with the market price projections presented in the testimony of Company witness Loxley. The shopping credits in the Stipulation also make provision for transmission costs, and the losses and sales tax which will be incurred by third party suppliers. We note that the shopping credits are on par with, and indeed on average slightly higher than those in the PECO service territory in Pennsylvania. These higher shopping credits are noteworthy because, both during the evidentiary proceeding and in comments on the Stipulation, various marketers have pointed to the PECO service territory as having the most robust and active retail electricity marketplace in the nation, and the

PECO service territory lies in the same regional electricity marketplace as PSE&G.

On the other hand, we find that the shopping credits proposed in Stipulation II are excessive, unsupported by the record, and based upon flawed reasoning. First, because of the interrelatedness between the shopping credits and the rate reductions, as addressed above, and having established herein the appropriate levels for the other unbundled rate components, namely the distribution charge, including the Corporate Business Tax ("CBT") and the Transitional Energy Facility Assessment ("EFA"), SBC, MTC, and TBC, and having found that Stipulation II's underlying financial analysis is flawed, the level of shopping credits proposed in Stipulation II would lead to either lower rate reductions or a significant deferral of cost recovery, which would lead to higher rates in the future.

In addition, while acknowledging that the shopping credits in the Stipulation are higher than those in PECO's territory, the proponents of Stipulation II assert that, on a "real" basis, the credits in the Stipulation are lower, citing asserted changes in the PJM electricity market and differences in costs between New Jersey and Pennsylvania. It is asserted in supporting affidavits that the credits in the Stipulation would have to be raised by about 0.6 cents in order to provide a comparable level of competition to that enjoyed by PECO customers. Based on our review of the submissions, the Board concludes that almost all of the claimed differences (approximately 5 of the claimed 6 mill average difference) relate to asserted increases in market prices since the PECO shopping credits were established. We **FIND** the claim that an increase in the shopping credits to reflect alleged market price increases is necessary in order to provide savings similar to those afforded in the PECO territory to be simply untrue; no provision was made in the PECO decision by the Pennsylvania Public Utility Commission ("PaPUC") to update the shopping credits to reflect changed market conditions, as is suggested be done here. To the extent that

retail competition is flourishing in PECO's service territory, it is occurring at the fixed levels of shopping credits established by the PAPUC in April 1998, despite alleged increases in market price conditions. Moreover, even assuming arguendo, that the cited market prices presented via a post-hearing affidavit are accurate, it is important to note that while the Stipulation's shopping credits are premised on long-term pricing forecasts which have been the subject of substantial review in the proceeding, the proponents of Stipulation II would have the Board premise a decision to set shopping credits for four years based upon a current price condition; however, such price conditions may change daily, if not more often. Accordingly, the Board is not persuaded that it reasonably could or should base its decision on this "snapshot" market information. Rather, we **FIND** that it is more appropriate to establish the shopping credit levels based upon the market price forecasts over the four year Transition Period which have been presented in this proceeding and which have been the subject of extensive review in the record.

Finally, we **FIND** MAPSA's arguments in support of higher shopping credits to be internally inconsistent. MAPSA asserts that the BGS charge or shopping credit should be calculated using the Pennsylvania "residual" method, which begins with the bundled rate (recognizing the mandated discount) and then subtracts from that bundled rate the distribution rate, transmission rate, societal benefits rate and taxes. Such a method bears no relation to market prices, either current or projected, and might produce a shopping credit which is reflective of current market conditions only by happenstance. Moreover, the use of such a residual method during the last year of the Transition Period, when the rate discount increases to 13.9 %, would produce shopping credits which are actually lower than the level of shopping credits established herein.

With regard to the total level of opportunity for recovery of stranded costs, a key issue with respect to an assessment of the proposal in the Stipulation is the value assigned to the

generating assets as part of the transfer. Before addressing that issue, however, we address a related issue which as described herein has been raised in the comments by MAPSA and other the proponents of Stipulation II, specifically the assertion that the terms of the PSE&G Stipulation actually provide PSE&G the opportunity to recover over $1 billion more than the $3.075 billion net of tax recovery opportunity asserted by PSE&G. As described in our summary of the comments above, this is claimed to occur because, in addition to the $2.6 billion (including transaction costs) from securitized bonds, the Company will assertedly receive $120 million via a retained retail adder obtained from non-switching customers, $460.5 million via the distribution reserve amortization, $90 million via the agreed-upon Salem cost reduction, $90 million via the LEAC overcollection at July 31, 1999, $35 million via expiring amortizations, $800 million via documented mitigation opportunities and $600 million via the Genco transfer premium. After careful review, we **FIND** this assertion to be flawed for a number of reasons. Most substantially, the so-called Genco "transfer premium" represents essentially an advance by Genco to PSE&G in the amount of $600 million (which we modify herein to $540 million for reasons discussed below), above and beyond the net $1.768 billion agreed upon value of the assets (which we modify herein to $1.903 billion for reasons discussed below). This premium will be used to further reduce the capitalization structure of PSE&G, and is then to be repaid to Genco via the sources of revenue identified in the PSE&G Stipulation, namely the depreciation amortization, the retained adder, and the explicit MTC charge. In this manner Genco, not PSE&G, assumes any disassociated with collection of the $600 million (modified herein to $540 million) of unsecuritized stranded costs. However, the overrecovery assertion by MAPSA and others is incorrect, because it assumes that both the $600 million premium as well as the sources to repay the premium both count towards the recovery of the unsecuritized stranded costs. This results in a "double count," and resulting Calculation error of $600 million. Moreover, as will be

described in more detail below, the inclusion of $800 million of mitigation by MAPSA results in a further "double count," since mitigation has already been taken into account as part of the reduction in the total net of tax stranded cost quantification from $3.9 billion as filed by PSE&G as well as other elements of this decision. Moreover, MAPSA relies upon the Auditors Report as the source of the $800 million mitigation opportunity but, as pointed out by PSE&G, ignores the fact that the $800 million figure presented by the Auditors was a gross number, from which income taxes of over $300 million would have to be deducted in order to express the number net of tax, and therefore directly comparable to the stranded cost number which is expressed net of tax. Accordingly, we **FIND** the assertion that under the terms of the Stipulation PSE&G will overrecover the agreed upon level of stranded costs by over $1 billion to be based upon a flawed analysis and plainly incorrect.

As described herein, the Board received voluminous comments with respect to the asset valuation associated with the proposed transfer of generation assets to the affiliated Genco, with emphasis on the underlying support for the transfer itself, and particular emphasis on the value to be assigned to the non-nuclear generating units. At the outset, we **FIND** that the proposed transfer of generating assets from PSE&G to Genco and the proposed BGS supply arrangement from Genco to PSE&G are amply supported by the record in this proceeding. The Company's filing proposed that the Company would remain in the generation business throughout the then-proposed seven-year transition period, with PSE&G utilizing its generation assets to backstop capacity and reliability in New Jersey and the PJM grid during this period, and then transferring its generation assets to an affiliate of the holding company at the end of the transition period. This proposal was submitted in the context of PSE&G's assertion that a liquid and visible capacity market did not yet exist in the PJM control area, and the resultant proposal by PSE&G that the retail electric market be opened to competition on an energy-only basis, with PSE&G being responsible for

continuing to provide capacity for all retail customers. It is clear, and PSE&G has since acknowledged, that a liquid and visible capacity market has, in fact, been developed by the PJM ISO, and that the PJM now conducts regular capacity auctions. Accordingly, we **FIND** that the conditions which were originally assumed to prevail at the end of the then-proposed seven-year transition period, and which supported the proposal to transfer the generation assets at that time, are currently in place, and therefore support the immediate transfer of the assets.

We further **FIND** that the proposed BGS supply arrangement between Genco and PSE&G provides known rates and assurances during the transition period. Rather, than having PSE&G and its customers solely and immediately dependent on the wholesale marketplace for the procurement of BGS energy and capacity, the Genco arrangement provides a price guarantee and a capacity backstop, similar to the assurances which PSE&G originally proposed that it provide during the transition period via the retention of the generation assets within the utility. Since all the PSE&G generation facilities, including its nuclear power plants, will be transferred to the unregulated Genco affiliate, customers will no longer be exposed to operational risks associated with these facilities. Until BGS is bid out for year four of the Transition Period, Genco will assume all risks associated with providing BGS service at the pre-determined BGS prices. We **FIND** this reduction of risk and the fixed price to be a substantial benefit to customers. We are also of the view that the provisions of paragraph 29 of the Stipulation, which require that the transferred generation capacity be maintained by Genco as a capacity resource within PJM for at least the duration of the Transition Period is a significant benefit to consumers during periods of heavy demand. We **FIND** this restriction to be consistent with the intent of the originally-filed PSE&G proposal to backstop capacity and reliability with its owned generation and, subject to our modifications to paragraph 29 of the Stipulation delineated below, we

FURTHER FIND that it will provide a reasonable and appropriate transition mechanism to help preserve the reliability of the PJM grid and foster a competitive capacity market in the region, which, in turn, will inure to the benefit of PSE&G's customers through lower prices. With regard to paragraph 29 of the Stipulation, we clarify that the Board will retain jurisdiction over and will monitor whether Genco is making good faith efforts to sell excess capacity into the PJM system at market rates.

As pointed out by PSE&G in its comments, the proposed immediate transfer of PSE&G's generation assets is also responsive to the concerns voiced by a number of parties during these proceedings that the original PSE&G proposal for functional separation of generation coupled with affiliate relations standards might not be sufficient to protect against cross-subsidies and ensure a level competitive electric generation playing field. Indeed, several parties in the proceeding advanced the view during tile hearings that structural separation of generation-related assets into a separate corporate entity was necessary to provide adequate protections. The transfer proposed in the PSE&G Stipulation achieves those goals for the foregoing reasons, and we **FIND** it to be reasonable subject to the terms and conditions set forth herein.

Moreover, as evidenced by the language in subsection 7(d) of the Act, N.J.S.A. 48:3-55(d), a transfer of assets from an electric public utility to a related competitive business segment of the utility's holding company was contemplated by the Legislature and is permitted by the Act, subject to Board approval including a determination by the Board of the "full value" of the assets. We also note that the proposed transfer is consistent with the intent of the Act, which in subsections 8(a) and (b), N.J.S.A. 48:3-56 (a) and (b), declares electric generation service to be a competitive service not subject to rate base/rate-of-return regulation, and which in subsection 7(f), N.J.S.A. 48:3-55(j), prohibits an electric public utility or its related competitive business segment from

offering competitive electric generation service, but which in subsection 7(f), N.J.S.A. 48:3-55(f), permits a public utility holding company affiliate to offer competitive retail electric generation service or wholesale power service. By the terms of the Stipulation, Genco would not provide retail electric generation service, and therefore would not be in direct competition with electric power suppliers in the State, but would be providing wholesale power services. The corporate structure described in the proposed Stipulation is consistent with the structure permitted in the Act, and warrants our approval of paragraph 24 of the Stipulation, which requests a Board finding that Genco be characterized as an Exempt Wholesale Generator ("EWG"), meaning that it would be a wholesale provider of power not subject to rate of return regulation under the Board's or FERC's jurisdiction.

With respect to the valuation of the assets being transferred, there is a direct link between the value assigned these assets with respect to the transfer, and the magnitude of PSE&G's stranded costs: the higher the assigned value, the lower, the remaining stranded costs. The issue of the value of PSE&G's generation assets was litigated at length in the stranded cost proceeding, as described in the Initial Decision and summarized hereinabove. Extensive testimony with respect to both the proper net book value of the assets to be utilized for purposes of stranded costs, as well as the net present value cash flows forecasted to be generated by the generation facilities over their remaining lives was presented in evidence at the Office of Administrative Law. The discounted net cash flow analysis approach, which was utilized by PSE&G in its stranded cost calculation and utilized as well by other parties' witnesses in the case (albeit with different assumptions) represents an analysis that would be undertaken by a potential bidder to determine its offering price in an asset auction process. The ALJ weighed the arguments and rendered findings with respect to the various inputs, variables and assumptions underlying a discounted cash flow analysis, including market energy and capacity price forecasts, forecasted capital additions and operation and

maintenance costs, unit output and rates of return. We **FIND** that additional hearings are not required on this issue because there is sufficient basis in the record for a determination of the value of PSE&G's generation assets, and we **FURTHER FIND** that all parties have had ample opportunity during the proceedings to advance their arguments and introduce evidence with respect to the value of these assets.

As summarized above, in the comments on the proposed Stipulation, a number of parties urged the Board to consider the results of various recent fossil fuel generation divestitures throughout the country, arguing that recent data indicates that, when put up for sale and competitive bid, electric utility fossil fuel generation has fetched prices in excess of book value. While general trends as to the results of industry-wide asset sales may be somewhat instructive and while, as discussed below, we have considered them and taken them into account in our decision, we concur with the comments received from PSE&G that it is impossible to reasonably attempt to extrapolate PSE&G's asset values from the results from sales of other utilities' generating assets. Any number of unique and individual factors associated with a particular utility's assets may exist which would justify divergent outcomes or plant values. These factors include plant vintage and conditions, heat rates, location, state and/or local environmental regulations or restrictions, environmental liabilities, fuel restrictions, fuel commodity and transportation costs, labor agreements, state and/or local tax liabilities and market price conditions. These factors, as they apply specifically to PSE&G's assets, were included in this proceeding as part of the stranded cost calculations, as the discounted net cash flow analyses prepared by PSE&G and several other parties considered all future costs and revenues associated specifically with each individual PSE&G generating facility. A proposed analysis to bring the purported comparable sales into comparability was not offered by the proponents of Stipulation II, nor is it likely that such an analysis could be readily performed. We **FIND**, for

the foregoing reasons, that it would be unreasonable to rely upon these recent sales as the basis for a determination of the value of PSE&G's generating assets. We **FURTHER FIND** that there is ample support in the record for the Board to determine the market value of PSE&G's generating assets, and that the discounted net cash flow analyses presented in the stranded cost proceeding are the appropriate mechanism to be utilized to render such a determination.

As described herein, the Company performed a discounted net cash flow analysis to quantity the magnitude of its owned generation stranded cost, which it indicated in its filing amounted to approximately $3.9 billion. I.D. at 9. The Ratepayer Advocate, Enron and the Auditors each performed independent studies, using a similar methodology but varying assumptions and inputs. Numerous parties challenged various aspects of the Company's quantification. The discounted net cash flow methodology produces, and the $3.9 billion amount represents, a net-of-tax figure. In other words, this does not reflect the actual revenue requirement associated with recovery of generation stranded costs. The net-of tax-figure must be grossed up for federal and state income taxes to obtain the actual owned generation stranded cost recovery level.

The ALJ found a number of the proposed adjustments and assumptions of the parties to be appropriate and adopted same, including a higher future capacity factor for the Bergen and Mercer generating facilities, the cost of fuel and resulting dispatch rates, and PJM import levels supported by the RPA. I.D. at 40. He also found the Company's assumed escalation rate for capacity prices to be understated, and concluded that such prices should be escalated at the general inflation rate. I.D. at 41. He further concurred with NJPII's recommended adjustment to add the value of nitrogen oxide and sulfur dioxide emission credits to market revenues, as well as with Staffs proposed adjustment to remove the anticipated Salem steam generator replacement from the calculation, and with Enron's proposed adjustment to reflect cost values associated

with ancillary services. Id. The ALJ further concluded that the discount rate should be reduced to reflect an updated capital structure and cost of capital vis-a-vis the Company's last base rate case. Id. at 41-42. The ALJ also concurred with the Staff and RPA-proposed FASB 90 and 106 adjustments with respect to Salem. Id. at 42.

As described hereinabove, pursuant to the ALJ's recommendation, the parties met to attempt to provide a quantification of the ALJ's stranded cost-findings after the Initial Decision was released. While no consensus was reached among the parties, after the meeting, by letter dated November 18, 1998, the Auditors submitted to the Board a proposed quantification of the ALJ's stranded cost recommendations, reflecting a range of values based on three scenarios, from a low end of $2.485 billion, to a mid-range of $2.949 billion, to a high end of $3.310 billion. We **HEREBY ACCEPT** as reasonable, with one minor modification discussed below, the Auditors' mid-range quantification of the ALJ's decision with respect to PSE&G's net-of-tax owned generation stranded costs of $2.949 billion and, based on that quantification, **HEREBY ADOPT** the ALJ's I.D. with respect to the magnitude of PSE&G's net-of-tax owned generation stranded costs. We **FIND**, however, that the Auditors did not include any value for nitrogen oxide and sulfur dioxide emission credits, which adjustments the ALJ found appropriate. We note that NJPII, which recommended this adjustment. did not provide a quantification of these credits. While it is difficult to estimate the value of these credits with precision at this time, based on our judgment, we believe it fair to adjust the net-of-tax stranded cost amount of $2.949 billion to $2.94 billion to impute a value for. these credits, consistent with the ALJ's findings.

Accordingly, we **HEREBY FIND** the level of net-of-tax owned generation stranded cost for PSE&G to be $2.94 billion. This amount, when compared to the level of net-of-tax stranded costs which PSE&G would be afforded the opportunity to recover via the proposed Stipulation ($3.075

billion), results in a reduction to net-of-tax stranded cost recovery of $135 million. This decrease of $135 million in net-of-tax stranded cost vis-a-vis the level proposed in the Stipulation represents a finding by the Board that the market value of PSE&G's owned generation assets is $135 million greater than that assumed in the Stipulation. The comments received in response to the Stipulation, regarding recent industry divestiture information, would suggest that this increased value, vis-a-vis the Stipulation, should be assigned to the Company's fossil fuel generating units, since these types of units, as opposed to nuclear generation facilities, have obtained sales premiums. We therefore **FIND**, consistent with the general industry trends which have been noted in a number of the comments received, that the transfer value of the Company's fossil generating assets should be increased by $135 million. Accordingly, we **FIND** that the generating assets shall be transferred to Genco at the following market valuations: $0.046 billion for nuclear, and $1.857 billion for fossil. Thus, the full value of the generating asset transfer is $1.903 billion, in satisfaction of the requirements of subsection 7(d) of the Act, N.J.S.A. 48:3-55(d), which we **FIND** to be the full market value of the generating assets over their remaining useful life in accordance with the provisions of subsection 13(e) of the Act, N.J.S.A. 48:3-61(e).

Additionally, for the foregoing reasons, including the use of the generating assets by Genco to provide BGS at a fixed price over the Transition Period, the removal of operational risk from ratepayers, the removal of nuclear plant decommissioning responsibility and attendant risks, the maintaining of the capacity associated with the transferred generation as a capacity resource for the duration of the Transition Period, and the receipt by PSE&G of full market value for the assets, we **FIND** that the transfer, subject to the terms set forth herein, is in the public interest and will not jeopardize system reliability. Moreover, for the foregoing reasons and because this Order and its implementation will

not impair the financial integrity of PSE&G or its holding company, because allowance has been made for continued recovery of post-retirement benefits (except for prospective post-retirement benefits associated with generation employees which become the responsibility of Genco) in PSE&G's rates, and because the transfer of assets will result in the generation employees remaining employees under the holding company, we **FIND** that the transfer will not adversely impact PSE&G's ability to meet its pension obligations to its employees.

We note that, as a result of the transfer of all generating assets to Genco, Public Service Enterprise Group will likely have non-regulated assets in excess of 20%. The Board's Decision and Order implementing the results of the Focused Audit (Docket No. EA92040459) ("Focused Audit Order") required the Company to notify the Board if the non-regulated assets exceeded 20% to allow the Board to assess the potential adverse financial effects of under-performing non-regulated businesses on the credit-worthiness of PSE&G, and thereby prevent possible impairment of the utility's ability to render safe, adequate and proper service. Due to significant changes in the industry and in particular, the changes in the Company's corporate structure being brought about as a result of this Final Decision and Order, modifications to the Board's June 17, 1986 Order Authorizing Transfer of Stock and Approving Merger, Docket No. EM8507774, ("Holding Company Order") and relief from or modifications to the Focused Audit Order may be warranted. The Company is **HEREBY DIRECTED** to file a petition to either maintain the existing regulatory parameters or to propose modifications thereto, by no later than the end of the first quarter of 2000. In the interim period, the Board will deem Public Service Enterprise Group and PSE&G not to be in violation of the non-regulated asset ratio established by the Board in May 1993. However, the Board will continue to monitor this issue and reserves the right to make further rulings in this matter as warranted.

With respect to the transfer of the nuclear generation assets (and the related transfer of the decommissioning trust funds in accordance with paragraph 33 of the PSE&G Stipulation), we noted above the benefits associated with the transfer of not only operational risk but, also, decommissioning risk and responsibility to Genco, attendant with Genco's opportunity to earn non-regulated returns associated with the sale of power and related services from the nuclear units. In order to ensure that the risk and responsibility of decommissioning is fully transferred to Genco along with the transfer of the assets and the decommissioning trust funds, recognizing that funding for decommissioning will remain in the SBC paid by PSE&G customers, we believe it necessary to place parameters on such continued funding by ratepayers and we shall do so. We, therefore, **DIRECT** that, within ninety (90) days of the date of this Order, PSE&G submit to the Board for its approval, a specific proposal a limit to its financial responsibility for funding, and, in turn, for ratepayers' obligation to fund through the SBC, the cost of decommissioning the nuclear units transferred to Genco. We **ADDITIONALLY DIRECT** PSE&G to submit all accounting entries that will be made upon the transfer of the decommissioning trust funds to Genco.

With regard to the level of securitization of stranded costs, the ALJ concluded that PSE&G's proposal in the case to securitize $2.5 billion of its total net of tax stranded cost with 15 year bonds will result in reasonable savings to ratepayers which will be flowed back to ratepayers through a reduction in base rates, (estimated at 2.7% assuming a 7.5% interest rate), is consistent with the Final Report and should be adopted. I.D. at 68. We further note that subsection 14(c) of the Act, N.J.S.A. 48:3-62(c), provides that the Board may, in the event that an electric public utility has not divested itself of a majority of its generation assets, authorize the issuance of transition bonds for utility generation plant stranded costs determined to be recoverable pursuant to paragraph (1) of subsection 13 (a) of the Act, N.J.S.A. 48:3-

61(a), in the amount of 75 percent of the total amount of an electric public utility's recovery-eligible utility generation plant stranded costs. As set forth herein, the Board has found, pursuant to the provisions of section 13 of the Act, N.J.S.A. 48:3-61, that the net-of-tax level of owned generation stranded cost is $2.94 billion. For purposes of establishing an actual revenue requirement necessary to provide PSE&G an opportunity to recover $2.94 billion in stranded costs after-tax, it is necessary and appropriate to gross-up this amount, to account for the fact that PSE&G will incur an income tax liability associated with the recovery of net-of-tax stranded costs, and to afford PSE&G the opportunity to collect appropriate taxes associated therewith. However, we concur with the concerns raised by Staff during the litigation of these proceedings, as well as the RPA and others during the comment period, and **HEREBY REJECT** as inappropriate and, in our view, inconsistent with the intent of the Act, the proposal within the Stipulation, supported by all signatories thereto except the NJCU, that all taxes related to securitization be recovered through the transition bond charges. We conclude that the transition bond charge is appropriately utilized to provide and ensure collection of the principal and interest payments on the transition bonds. The assured collection of the bond principal and interest provided via the irrevocable transition bond charge is necessary in order to obtain the highest possible rating on the bonds, which, in turn, will result in the lowest possible interest rate on the bonds and resultant maximized ratepayer savings. We do not believe it appropriate, nor consistent with the intent of the Act, that the utilities' tax obligations be collected via the irrevocable transition bond charge. As indicated previously, however, it is entirely appropriate and necessary that the net-of-tax stranded cost number be grossed-up for ratemaking purposes, and that PSE&G be afforded the opportunity to fully recover these taxes.

Accordingly, the Board **HEREBY DIRECTS** that a Market Transition Charge be established, coincident with the establishment of the transition bond charge, pursuant to

section 13 of the Act, specifically for the collection of securitization-related Federal Income and State Corporate Business Taxes ("MTC-Tax"). The taxes to be collected through the MTC-Tax shall reflect the grossed-up revenue requirements associated with the net-of-tax amount of stranded costs, together with the estimated level of transaction costs, authorized by the Board herein for recovery through securitization. PSE&G is **HEREBY AUTHORIZED** to impose the MTC-Tax until the related bondable stranded costs including principal and interest have been paid in full. The imposition of the MTC-Tax over the same term as the imposition of the TBC and, as such, beyond the eight year limitation of the Act, is permitted in accordance with the provisions of paragraph (3) of subsection 13(i) of the Act, N.J.S.A. 48:3-61(i)(3), and is, in our view, reasonable and necessary to realize the estimated level of securitization-related rate savings as reflected in the record, since the PSE&G proposal in the proceeding which formed the basis for the securitization savings estimates was to include the collection of the tax gross-up amount in the TBC itself. The collection of the tax gross-up amount through a MTC-Tax with a duration shorter than that of the TBC would have the effect of decreasing the securitization-related savings. The Board therefore, **DIRECTS** that the MTC-Tax be separate and distinct from the MTC established for the collection of stranded costs associated with power purchase agreements with non-utility generators over the life of those contracts and the MTC established for recovery of the unsecuritized utility stranded costs over a four year time period. The Board **HEREBY DIRECTS** that the MTC-Tax shall be subject to periodic review and adjustment, consistent with the provisions of subsection 13(g) of the Act, N.J.S.A. 48:3-61(g), to reconcile the income taxes required to be paid on the taxable net revenue from the TBC collections (we note that any such adjustment will not include adjustments for market price, as market value for the assets is fixed as a result of the transfer). We concur with the concerns expressed in some of the comments that there should be a provision for adjustments in

the event the tax laws change and, thus, we **HEREBY DIRECT** that the reconciliation shall include adjustments for changes in statutory federal and state tax rates. The reconciliation shall be formula driven to reflect the tax requirements arising from the issuance of transition bonds, the collection of transition bond charges and the collection of the MTC-Tax. The Board further **FINDS** that the Company is entitled to the opportunity to full and timely recovery of the associated income taxes for as long as transition bond charges remain collectible.

With respect to the net of tax amount of stranded cost to be securitized, we **HEREBY AUTHORIZE** PSE&G to securitize an amount of up to $2.4 billion, plus an additional amount of up to $125 million for related and reasonably and prudently incurred transaction costs. Upon receipt and review of an application by PSE&G, the Board will consider the issuance of a bondable stranded costs rate Order ("Financing Order") authorizing the issuance of transition bonds in these amounts with a scheduled amortization of 15 years and the imposition of a transition bond charge therefore, pursuant to section 14 of the Act, N.J.S.A. 48:3-62. The Board **HEREBY FINDS** that issuance of transition bonds in these amounts is necessary for PSE&G to meet the rate reductions determined by the Board herein to be necessary and appropriate consistent with the provisions. of sections 4 and 13 of the Act, N.J.S.A. 48:3-52 and 61, and to meet the other requirements of the Act, specifically, the establishment of shopping credits at a level which will foster a competitive marketplace. Specifically, absent the estimated savings from securitization, PSE&G would not be able to meet the required phased-in rate reduction steps of 7% on January 1, 2000 and 9% on August 1, 2001, or, in the alternative, would have to substantially reduce the shopping credits.

Moreover, we emphasize that, in addition to securitization savings being necessary for PSE&G to achieve phased-in rate reductions on January 1, 2000 and August 1, 2001 which exceed the minimum required rate reductions in

the Act, our authorization of the issuance of transition bonds in the amount of $2.4 billion, and PSE&G's receipt of the proceeds therefrom, provides a significant benefit to the Company. It is, therefore, entirely appropriate and necessary that the Board condition the implementation of securitization on the implementation by PSE&G of the herein directed rate reductions of a minimum 7% on January 1, 2000 and a minimum 9% on August 1, 2001.

We further note that Attachment 1 to the PSE&G Stipulation contains a calculation of the estimated savings related to securitization during the Transition Period, based upon an assumed transition bond interest rate of 6.5%, reflective of the then-prevailing rate, and an amortization period of 15 years. Based upon the assumptions set forth therein, the issuance of transition bonds will provide tangible and quantifiable benefits to ratepayers on the order of 3%. We note that the requested level of securitization of $2.475 billion in the Stipulation is approximately equal to, and indeed modestly ($25 million) lower than the original $2.5 billion proposal found reasonably appropriate by the ALJ. Our determination to require a $75 million reduction in the level of stranded cost securitization, from $2.475 billion as proposed in the PSE&G Stipulation to $2.4 billion, reflects a pro-rata reduction in the level of authorized operation related securitization consistent with the $135 million reduction ordered herein to the requested level of total stranded cost recovery (from $3.075 million to $2.940 billion).

We **FURTHER FIND** that the total recoverable stranded cost revenue requirement, based upon a statutory federal and state tax rate of 40.85% and a net-of-tax recoverable stranded cost amount of $2.94 billion, is approximately $4.97 billion. Accordingly, we **FIND** that the authorized level of stranded cost securitization of $2.4 billion, represents approximately 48% of the total amount of the recovery eligible generation related stranded cost rate recovery authorized, and thereby meets the requirements of subsection 14(c) of the Act, N.J.S.A. 48:3-62(c). The

proceeds received by PSE&G from the issuance of $2.4 billion of transition bonds shall be utilized by PSE&G to reduce the capitalization of PSE&G, in a manner which does not substantially alter the overall capital structure of the utility adverse to the interests of bondholders or ratepayers. Consistent with maintaining an appropriate credit rating for the distribution utility, and in order to increase the ratepayer benefits that result from the use of the securitization proceeds, we view an increase in the debt component of PSE&G's (the utility's) capitalization as failing within this requirement.

Having established herein the level of total net-of-tax generation-related stranded cost at $2.94 billion, and having authorized the issuance of transition bonds to "refinance" $2.4 billion, PSE&G shall be afforded the opportunity, consistent with the provisions of section 13 of the Act, N.J.S.A. 48:3-61, to recover up to $540 million, net-of-tax, through an MTC, representing the unsecuritized amount of PSE&G's stranded costs. The actual revenue requirement associated with this $540 million recovery opportunity, based upon a 40.85% Federal and State income tax rate, is on the order of $760 million. Consistent with the provisions of the PSE&G Stipulation (as modified herein), the $540 million is to be provided up-front by Genco to PSE&G in the form of a transfer premium. These funds shall be used by PSE&G, much like the proceeds from the transition bonds, to refinance and/or retire its debt and/or equity. This will benefit the utility and, ultimately, the customers of PSE&G by further reducing PSE&G's cost of capital. PSE&G will have the opportunity to recover up to $540 million, net-of-tax, through any retained retail adder associated with non-switching or returning customers, the MTC (exclusive of the NTC and the MTC-Tax) and the amount funded by the excess distribution reserve amortization', which funds, will be, in turn, transferred to Genco as received pursuant to the terms of the BGS contract (as modified and approved herein). At the end of the Transition Period, the recovery of the $540 million will be reconciled with actual collections as set forth herein, with PSE&G being at risk for any shortfall and customers

receiving the benefit of any overrecovery via a credit of such excess amount to the SBC. We **FIND** this mechanism to be consistent with the provisions of section 13 of the Act, N.J.S.A. 48:3-61, which require that we afford the utility the opportunity, but not a guarantee, for recovery of generation-related stranded costs, and that (with specific reference to subsection 13(g) of the Act, N.J.S.A. 48:3-61(g)), we reconcile stranded cost recoveries to ensure that the utility will not collect in excess of its stranded costs. The above-described mechanism has the added benefit of transferring the risk of non-recovery of stranded costs to Genco, the unregulated affiliate, and not the utility, since PSE&G will receive the $540 million from Genco up-front in the form of a transfer premium.

With regard to the rate unbundling and rate design proposal in the PSE&G Stipulation, we note the Act requires at subsection 4(c), N.J.S.A. 48:3-52(c), in addition to the mandated rate reductions for each customer class as provided in subsection 4(d), N.J.S.A. 48:3-52(d), that rate unbundling not result in a reallocation of utility cost responsibility between or among different classes of customers. Taken together, it is our belief that these sections require that the Board implement unbundled rate designs which afford, to the extent practicable, each customer within each customer class the mandated level of rate reductions. Moreover, the Act at subsection 4(b), N.J.S.A. 48:352(b), explicitly requires that each customer's bill indicate the dollar amount of the savings attributable to the mandated rate reductions. While we reserve final judgement on the actual proposed rates to be implemented pending our review of PSE&G's compliance tariff filing, we **FIND** that the overall rate design proposed in the PSE&G Stipulation, and specifically the implementation of the rate reduction credit, and the dollar savings statement on the bill, is consistent with the intent of the Act during the Transition Period. The rate reduction credit, as we envision it, is designed to assure that all customers receive the required reduction off the sum of the unbundled rate components. However, we are concerned that, subsequent to the Transition

Period, such rate design could have unintended and unnecessary impacts on PSE&G's customers, since the termination of the rate reduction credit at the end of year four would, absent any other adjustment, result in an increase in rates in year five which would equal the amount of the credit in effect in year four. Moreover, the elimination of the credit in year five could result in an unpermitted shift in cost responsibility. Although it is not known at this time what the BGS rate will be in year five or what the level of deferred balances for the SBC and NTC will be at that time, the Board is concerned that a simple removal of the rate reduction credit in year five without a reassessment of the other unbundled rate elements, could result in total charges which exceed the total of the otherwise appropriate unbundled rate elements. We also **FIND** it necessary and appropriate for the Board to review the overall level of rate savings as well as the level of the distribution rate design and the other unbundled rate components, including the SBC and the NTC, prior to the conclusion of the Transition Period to determine, among other things, whether any additional future savings should be passed along to ratepayers prospectively.

With respect to the level and design of distribution rates, we note the ALJ's conclusion that the 1995 cost of service study is the only evidence available in the record with respect to cost of service, and that the parties had an opportunity to review and criticize it. Moreover, we acknowledge that the Final Report indicates that each electric utility's rates are to be unbundled utilizing the cost of service study employed to set rates in each company's last base rate case. However, we are now vested with the responsibility of implementing the Act, which was passed and signed into law subsequent to our issuance of the Final Report and, indeed, after the close of hearings in these matters. The Act requires that rate reductions be implemented over a three year period, and sustained for at least one additional year through July 31, 2003, in effect, resulting in a price cap on the distribution and other unbundled rate components through that date. As such, the price cap will be in effect, and PSE&G will be required to

maintain its distribution rate without adjustment, through a date more than ten years from the conclusion of PSE&G's last base rate case. In light of this, and the fact that, unlike other unbundled rate components the distribution rate will not be subject to true-up and reconciliation, it is our judgment and determination that PSE&G should not be required to submit a cost of service study from the 1992 base rate case, but that it instead be permitted to use the 1995 cost of service study which was entered into the record and which the parties had an opportunity to review and critique during the hearing process. Use of the 1995 study provides a greater assurance, in light of the price cap to be imposed through July 2003, that PSE&G's distribution rates are being established at a reasonable level based on the record in this case and is supported by the record. Moreover, the distribution rates set forth in the PSE&G Stipulation, while reflecting the updated 1995 cost of service study, incorporate a $20 million decrease in annual distribution revenue requirements relative to the amount supported by the study, to reflect a more current overall cost of capital of 9.5%. This provides further assurance that the average level of distribution rates being set via the PSE&G Stipulation is reasonable.

With regard to the specific unbundled rate components, we **FIND** that the establishment of an SBC which will include costs for social programs, nuclear decommissioning costs, demand side management costs manufactured gas plant remediation costs and consumer education costs is consistent with the provisions of section 12 of the Act, N.J.S.A. 48:3-60. We also note that the composition of the SBC, as proposed in the PSE&G Stipulation, remedies the deficiency in the Company's original proposal, which inappropriately included NUG contract costs and gross receipts and franchise tax in the SBC. The Act does not permit the inclusion of NUG contract costs or GP&FT taxes in the SBC. The establishment of the initial SBC at a level of costs included in rates as of the effective date of the Act and sustaining such rate for the duration of the four-year Transition Period is consistent with the provisions and intent of section 12 of the Act, N.J.S.A.

48:3-60, and is also consistent with the imposition of a four-year price cap pursuant to section 4 of the Act, N.J.S.A. 48:3-52. Moreover, it is appropriate and, we believe, consistent with the intent of the Act, that the Company be provided the opportunity to fully recover reasonable and prudent expenditures for the types of programs reflected in the SBC. These programs all provide social and/or environmental benefits, and are mandated to be performed or funded by utilities pursuant to State laws, regulations or agency orders. Accordingly, we **FIND** that deferred accounting treatment of under and overrecoveries, along with appropriate carrying costs to reflect the cost (to the utility or, in the case of an overrecovery, the customer) of financing deferred monies, is necessary and appropriate in order to provide for full recovery under the legislatively required price cap mechanism.

Since PSE&G is being afforded herein the opportunity to recover, beginning August 1, 1999, all of its remaining above-market owned generation costs through the market transition charge, MTC-Tax and transition bond charge, it is our determination that continued collection through the SBC (formerly the DSAF) of generation-related lost revenues attributable to demand side management programs would result in an overcollection of generation costs. Accordingly, we **FIND** that such generation-related lost revenues arising subsequent to that date shall cease to be collected after July 31, 1999.

As noted above, the proposed Stipulation appropriately removes the recovery of above-market NUG contract costs from the SBC, as originally proposed. Instead, these costs are to be collected via a separate NTC, which is to be set at an initial level of $183 million annually and sustained at this level over the Transition Period, with the difference between NTC recoveries and actual above-market NUG contract costs to be subject to deferred accounting, including interest on accrued under or over recoveries. The establishment of a separate charge for the collection of above-market NUG contract costs, subject to reconciliation, is consistent with the

findings of the ALJ, who concluded that such a mechanism would permit the timely pass-through to ratepayers of benefits of any NUG contract renegotiations. We note that with the price cap imposed by the Act, the NTC will not be actually adjusted during the Transition Period; however through deferred accounting and interest accrual on cumulative under or over recoveries, ratepayers will be assured of receiving the full benefits of any NUG contract renegotiations, as envisioned by the ALJ and indeed as required by the Act. Section 13 of the Act, N.J.S.A. 48:3-61, permits recovery by an electric public utility through a market transition charge of stranded costs related to long- term NUG contracts, provided that the utility has demonstrated the full market value of each such contract and that it has taken all reasonably available measures to mitigate the contracts' above-market costs, subject to periodic review and adjustment of the charge to ensure that the utility will not collect charges that exceed actual stranded costs, and provided that the charge is not set at a level which prevents the achievement of the mandated rate reductions. Moreover, the Act permits a NUG-related MTC to be set for a term as long as the duration of the NUG contracts, and requires that any and all savings resulting from NUG contract renegotiation, buyout or buydown be passed back to ratepayers in a timely manner. We **FIND** that the establishment of the NTC as proposed in the PSE&G Stipulation and described herein, which NTC we regard as a separate market transition charge dedicated solely to NUG contract stranded cost recovery, is consistent with the provisions of section 13 of the Act, N.J.S.A. 48:3-61. Pursuant to the provisions of subsections 13(e) and 13(f) of the Act, N.J.S.A. 48:3-61(e) and (f), PSE&G will retain the ongoing obligation to demonstrate that it has obtained the full market value for the NUG contract power, and that it has taken all reasonably available steps to mitigate above-market NUG contract costs. Specifically, while we approve herein the proposed sale by PSE&G of NUG contract energy and capacity at wholesale PJM locational marginal prices and at wholesale, respectively, PSE&G will be required to sell such

power through alternative means if such means are available at a more beneficial market price, and PSE&G will be required to continue to make reasonable attempts to renegotiate, buy out or buy down its NUG contracts.

We also **FIND** that the proposed bidding out of BGS for year four of the Transition Period is consistent with the Act. Subsection 9(a) of the Act, N.J.S.A. 48:3-57, provides that each electric public utility must provide BGS for at least three years subsequent to August 1, 1999 and thereafter until the Board finds that such provision is no longer necessary and in the public interest. Subsection 9(a) further provides that power procured for BGS shall be purchased at prices consistent with market conditions, that the BGS charges to customers shall be regulated by the Board and "based on the reasonable and prudent cost of...providing such service...", and that the aggregate rate-reductions be sustained notwithstanding the resultant BGS charges. The proposed Stipulation provides that PSE&G will provide BGS through July 31, 2002 in conformance with the Act. The BGS pricing provided by the proposed Stipulation, both during the first three years of the Transition Period when BGS is provided by PSE&G as well as during the fourth year when BGS will be provided for the first time by a third party as a result of the bid, is established and is based upon the market price projections (plus a retail adder as discussed herein) for the four year period in the record. In this manner, BGS pricing for the Transition Period is consistent with market conditions as required by the Act. We expect that the bidding out of BGS for year four as provided in the Stipulation will have the added benefit of creating substantial competition among third party suppliers for the right to provide this service at the pre-established BGS rate/shopping credit price, thereby potentially producing added benefits to customers consistent with the provisions of paragraph 17 of the proposed Stipulation. This mechanism is consistent with the intent of the Act to place greater reliance on competitive markets to deliver energy services at lower costs (see subsection 2(a)(2) of the Act, N.J.S.A. 48:3-50(a)(2)). At the same time,

however, the mechanism provided to have suppliers bid for the right to provide BGS during year four at the pre-established price, will assure that the aggregate rate reductions will be sustained in year four, and wilt-provide price stability as part of a reasonable and appropriate transition mechanism to the reliance on the competitive market for the provision of BGS. Accordingly, subject to the foregoing and to the terms of this Order, we **FIND** that it will no longer be necessary and in the public interest for PSE&G to provide BGS in year four of the Transition Period or thereafter if BGS is successfully bid publicly as proposed in the Stipulation. We **HEREBY DIRECT** that the Company file, by no later than August 1, 2001, a specific proposal for public comment and review and approval by the Board to implement a request for proposals ("RFP") to supply basic generation service for the period August 1, 2002 through July 31, 2003. Such proposal should include a proposal to assure that any RFP does not provide any undue competitive advantage to an affiliate of PSE&G, and that the selection process does not allow for favored treatment of an affiliate of PSE&G, should such affiliate choose to participate in the bidding process.

Pursuant to the provisions of subsections 7(f), 7(l), 7(j) and 8(b) of the Act, N.J.S.A. 48:3-65(f)(l) and (j) and N.J.S.A. 48:3-66(b), taken together, an electric public utility is not permitted to offer competitive electric generation service and, pursuant to the definitions provided in section 3 of the Act, N.J.S.A. 48:3-51, basic generation service is not a competitive service. Accordingly, we **FIND** the provisions of paragraph 18 of the proposed Stipulation to be consistent with both the letter and intent of the Act. With regard to the relationships and transactions between PSE&G and Genco, other than those specifically governed by the terms of the BGS contract provided for herein and as subsequently reviewed and approved by the Board, rather than adopting either of the standards proposed in the Stipulation, we deem it most appropriate and efficient to subject PSE&G and Genco

to the same standards as we shall be imposing on other utilities and their affiliates, and thereby determine that such relationships 2nd transactions between PSE&G and Genco shall be governed by the affiliate relations standards adopted by the Board pursuant to section 8 of the Act, N.J.S.A. 48:3-56.

Notwithstanding the foregoing, and in light of the establishment of shopping credit levels which, while overall reflective of market prices may not adequately reflect the seasonality of market prices and, in order to deter suppliers from offering services to customers that might cause them to leave BGS during low cost periods and return to BGS during high cost periods, thereby "gaming" the system, the Board **HEREBY ADOPTS** the following protections. PSE&G shall have the option of imposing a one-year commitment on any non-residential customer returning to BGS unless such customer selects a new third party supplier within 30 days of the return to BGS. Notwithstanding the 30 day "grace period," any non-residential customer returning to BGS during May of any year shall become subject to the one-year commitment unless a new third party supplier is selected before June 1 and any non-residential customer returning to BGS during June, July or August of any year will immediately become subject to the one-year commitment without any "grace period" to select a new third party supplier. We decline to adopt a similar mechanism for residential customers at this time, because we are mindful that the residential market in general has been a more difficult market for third party suppliers to penetrate, and we wish to minimize, where practicable, restrictions which may dissuade residential customers from switching to a third party supplier. We will monitor developments, including products and services being offered to residential customers by third party suppliers, and will revisit the possible imposition of the one-year commitment provisions on residential customers if it becomes clear that our decision at this time has led to gaming by suppliers and/or customers.

The Board notes that the Stipulation does not provide for the Investment Tax Credit ("ITC") value to be flowed through to ratepayers., The Board **HEREBY DIRECTS** the Company to seek a letter ruling from the IRS to determine whether or not the value of the ITC can legitimately be credited to customers without violating the tax normalization policies of that Agency to the detriment of the Company and the customers, and to provide a copy of that letter ruling once received from the IRS to the Board and the Ratepayer Advocate. In the event that the IRS issues a letter ruling that the ITC cannot be passed onto customers, then this issue will be moot. In the event that the IRS issues a letter ruling which is favorable to the proposition that the ITC can be passed onto customers, then the Board in year four of the Transition Period will consider any action which it may deem appropriate, giving consideration to the issues resolved in the Stipulation of March 17, 1999, the Board's modifications to that Stipulation, and other relevant considerations which the parties might bring to the Board's attention in that review of the issue during year four of the Transition Period.

Finally, we address the issue raised in the proceeding by Co-Steel, described hereinabove, with respect to the imposition of stranded cost or related charges such as the transition bond charge on power consumed by Co-Steel under its special contract dated November 14, 1994 with PSE&G, which issue was litigated during the proceeding before ALJ McAfoos but which was not addressed in the Initial Decision. Block 1 of Co-Steel's usage under the special contract is based on the Company's HTS tariff. The Act makes clear that the MTC, TBC and SBC are to be non-bypassable charges (except for eligible on-site generator customers pursuant to section 28 of the Act, N.J.S.A. 48:3-76)). Customers on the HTS tariff, must therefore be assessed MTC, TBC and SBC charges. However, pursuant to the requirements of section 4 of the Act, N.J.S.A. 48:3-52, HTS customers, as well as all other customers, will experience a 5% aggregate rate reduction effective August 1, 1999, a 7% rate reduction on or about January 1, 2000, a 9% rate reduction effective August

1, 2001 and a 13.9% rate reduction effective August 1, 2002. Importantly, all such rate reductions are inclusive of the imposition of the MTC, TBC and SBC charges. Indeed, a portion of the aggregate rate reductions which will be received are a direct result of the securitization approved herein; enjoyment of those price reductions by a customer without paying towards the transition bonds and related costs which helped make such reductions possible would be unfair. Accordingly, we **FIND** that there is no legal basis in the Act for an exclusion for Co-Steel from paying the MTC, TBC and SBC charges, and indeed there is no merit for Co-Steel's arguments whatever, since the cost of its power consumption under Block 1 of the special contract will be reduced as a result of the Act and this Order and, moreover, as already acknowledged by PSE&G, Co-Steel's Block 2 usage will be governed by the special contract and, therefore, the price thereof will be unaffected by this Order. We therefore **REJECT** Co-Steel's arguments, including its assertion that it should be released from its contract and be able to shop for an alternative supplier immediately, since there has been no material change to the contract for which PSE&G and Co-Steel bargained. Moreover, Co-Steel will be receiving power at a net price lower than that originally bargained for as a result of this Order. Finally, we **REJECT** the arguments made by Co-Steel that it should be exempted from the imposition of any stranded cost charges after the expiration of the special contract. Simply put, any special pricing arrangements for which it has bargained expire with the expiration of the special contract. After the expiration of its contract with PSE&G, Co-Steel will be subject to and have all of the options afforded under applicable law, including with regard to utility tariffs, and the ability to shop for an alternative supplier.

Based on the above, we hereby incorporate as a fair resolution of the issues in these proceedings, the elements of Paragraphs 1 to 36 of the Stipulation filed by PSE&G and others, subject to the modifications and clarifications set forth

above, along with the specific modifications and clarifications set forth below. To the extent the Initial Decision is inconsistent herewith, it is modified to conform herewith.

Based upon the foregoing, we **HEREBY FIND** and **DIRECT** as follows:

1) Electric rate reductions shall be implemented by PSE&G as follows to comply with the provisions of subsection 4(d) of the Act, N.J.S.A. 48:3-52(d):

   a) A 5% aggregate rate reduction from rates in effect as of the date of the Board's Summary Order in this matter (hereinafter "current rates") for service rendered on and after August 1, 1999. This reduction includes a 1 % reduction relating to the savings from securitization.

   b) A minimum additional rate reduction of 2% of current rates targeted for service rendered on or after January 1, 2000 subject to the issuance prior to such date of a Bondable Transition Cost Rate Order establishing a securitization bond charge and providing for the securitization of $2.4 billion of generation-related stranded costs and the recovery of up to $125 million of related and reasonable and prudently-incurred taxes, costs of issuance, and transaction costs including costs of refinancing or retirement of debt or equity as provided in paragraph 11 (together "Bondable Stranded Costs") and the sale of the securitization bonds. The date of the reduction will be the same date as the securitization transition charge is established.

   c) A further minimum 2% rate reduction for service rendered on or after August 1, 2001 to bring the total rate reduction to 9% from current rates assuming that securitization is implemented should greater savings be achievable as a result of securitization as implemented, the additional

savings shall be reflected in reductions beyond the requisite minimums set forth herein in (b) and

d) A final rate reduction for service rendered on and after August 1, 2002, in an amount that, when considered with the above reductions, will result in a rate reduction by customer class of 10% relative to rates in effect as of April 30, 1997.

e) All rate reductions will be applied to each customer's bill to reflect the above reductions, as set forth on Attachment 2 of the PSE&G Stipulation page 2 of 19. However, as discussed herein, we are concerned that the removal of the rate reduction credit in year five will lead to an undue bill impact, since removal of the entire rate reduction credit would appear to result in a total customer bill which exceeds the sum of the current unbundled rate components, including the distribution rate, BGS rate (including transmission), STC, NTC, and SBC which will remain, prior to adjustment, in year five. Moreover, we are concerned that the particular unbundled rate components, particularly with respect to distribution charges, as provided in Attachment 2 of the Stipulation will, after the expiration of the rate reduction credit, result in a shift in cost responsibility between and among customer classes. As further discussed herein, we also find it necessary and appropriate for the Board to review the overall level of rate savings prior to the conclusion of the Transition Period. We therefore **DIRECT** the Company to file, by no later than August 1, 2002, the proposed unbundled rates and support therefor which it proposes be implemented at the expiration of the Transition Period on August 1, 2003.

f) The rate reduction described in paragraph 1(d) shall be sustained until July 31, 2003.

2) There shall be a four-year transition period commencing on August 1, 1999 and terminating on July 31, 2003 (Transition Period).

3) The unbundled rates to be effective for each rate class in PSE&G's Tariff for Electric Service have been developed using the Company's 1995 Cost of Service Study using the parameters defined in Attachment 2 of the PSE&G Stipulation, including the unbundled rates and rate components. Each customer's bill shall indicate the dollar amount of the difference between what the customer's total charges would have been without the reduction and the total charges in that bill pursuant to subsection 4(b) of the Act, N.J.S.A. 48:3-52(b).

4) An excess electric distribution reserve in the amount of $568.7 million is to be amortized over three years and seven months beginning on January 1, 2000 and ending July 31, 2003. Amortization amounts will be $125 million in the year 2000, $125 million in the year 2001, $135 million in the year 2002, and $183.7 million in the year 2003.

5) Consistent with section 12 of the Act, N.J.S.A. 48:3-60, PSE&G will establish a Societal Benefits Charge. The SBC will include costs related to 1) Social Programs (including the Universal Service Fund); 2) Nuclear Plant Decommissioning costs; 3) Demand Side Management Program costs; 4) Manufactured Gas Plant Remediation costs; and 5) Consumer Education Costs.

6) The SBC will be set at the level of costs for the above items included in rates as of February 9, 1999, the effective date of the Act, and as more explicitly defined in Attachment 2 of the PSE&G Stipulation. This SBC level will remain constant through the Transition Period. Actual costs incurred by the Company for each of the cost

components enumerated in paragraph 5 will be subject to deferred accounting. Interest adjusted on August 1 of each year of the Transition Period will be accrued on any under- or overrecovered balances. The interest rate will be based on seven year constant maturity treasuries as shown in the Federal Reserve Statistical Release on or closest to August 1 of each year plus sixty basis points. At the completion of the Transition Period, the SBC will be reset and then reset annually upon Board approval to amortize any over- or under collected balances.

7) The DSM generation-related lost revenue created subsequent to August 1, 1999 will no longer be reflected in the calculation of costs eligible for Demand Side Management Program cost recovery and deferral as described in Attachment 2 of the PSE&G Stipulation.

8) Consistent with section 13 of the Act, N.J.S.A. 43:3-61, the Company's unbundled electric tariffs and distribution service rates will include a NTC to recover the above-market stranded costs of PSE&G's existing non-utility generation contracts. These contracts will continue to remain the obligation of PSE&G during the life of the contracts. The Company will sell the energy and capacity from these contracts at the PJM Interchange Hourly Locational Marginal 'price and at wholesale within the PJM region, respectively. Notwithstanding the foregoing, the Company has an ongoing obligation to mitigate the above-market stranded costs recovered through the NTC, pursuant to subsection 13(f) of the Act, N.J.S.A. 48:361 (f).

9) The initial level of the NTC will be set based on the above-market non-utility generation costs for 1999 of $183 million (Exhibit PS-20, Schedule CJL-F3) and as more explicitly defined in Attachment 2 of

the Stipulation. This NTC level will remain constant for a period of four years from August 1, 1999. Actual annual payments made by the Company for NUG costs will be reduced by the value received from the sale of the energy and capacity associated with those contracts as described in paragraph 8. For the purpose of calculating the amount of stranded cost which PSE&G is entitled to recover during the Transition Period, any increase or decrease in the above-market costs will be subject to deferred accounting and interest, adjusted on August 1 of each year of the Transition Period, will be calculated on any under- or over-recovered balances. The interest rate will be based on seven year constant maturity treasuries as shown in the Federal Reserve Statistical Release on or closest to August 1 of each year plus sixty basis points. After the Transition Period, the NTC will be reset and then reset annually upon Board approval to amortize any over- or under-collected balances. Board approved buy-outs and buy-downs of NUG contracts will be reflected in this clause in a manner consistent with subsection 13(l)(3) of the Act, N.J.S.A. 48:3-61(l)(3).

10) The Company is entitled to recover $2.94 billion net-of-tax of its generation-related stranded costs resulting from a market valuation of $0.046 billion and $1.857 billion for nuclear and fossil generating assets, respectively. As set forth in paragraphs 11 and 13, the Company will be provided with an opportunity to recover up to $2.94 billion of net-of-tax generation related stranded costs through securitization of $2.4 billion and an opportunity to recover up to $540 million of its unsecuritized net-of-tax generation related stranded costs on a present value basis, subject to true-up on the collection of the unsecuritized generation related stranded costs

as provided in paragraph 17 hereinbelow. The accumulated LEAC overrecovery balance as of July 31, 1999, including accumulated interest thereon as of that date, shall be applied as a credit to the starting deferred balance for the NTC.

11) In order to comply with the requirements of section 14 of the Act, N.J.S.A. 48:3-62, PSE&G will utilize the net proceeds of securitization, after payment of all related fees and expenses of issuance and sale, to refinance or retire its debt and/or equity, in a manner that will not substantially alter the Company's overall capital structure to the detriment of bondholders or ratepayers; (ii) such refinancing and/or retirement of such debt may occur as a result of, among other things, mandatory and/or optional redemption, repurchase and/or tender by or on behalf of PSE&G, which optional redemption, repurchase or tender may be at a premium; and (iii) the Board **HEREBY AUTHORIZES** PSE&G to employ such methods as are reasonable and necessary to achieve the overall intent and purposes of the Act.

a) Upon application by PSE&G and determination by the Board that the conditions of the Act are met, the Board will issue a financing order consistent with the provisions of the Act, to authorize PSE&G to issue up to $2.525 billion of transition bonds representing $2.4 billion of net-of-tax generation-related stranded costs and up to $125 million of transaction costs including related fees and expenses of issuance, sale of bonds and to refinance or refund its debt and equity subject to approval of the Board. The taxes related to securitization, which reflect the grossed up revenue requirement number associated with the $2.4 billion in net of tax stranded costs

being securitized, are recoverable stranded costs, however they should not be collected through the transition bond charge; rather, such taxes shall be collected via a separate MTC referred to as an "MTC-Tax." The duration of this separate MTC shall be 15 years, or otherwise so as to be identical to the duration of the transition bond charge.

12)

a) PSE&G has taken reasonable measures to date on mitigation of stranded costs (Exhibit PS-14) and the terms of this Order including rate reductions, rate freezes, and other mitigation measures will create appropriate incentives in place to mitigate the total amount of its stranded costs;

b) PSE&G will not be able to achieve the level of rate reduction deemed by the Board to be necessary and appropriate pursuant to the provisions of Sections 4 and 13 of the Act, N.J.S.A. 48:3-52 and N.J.S.A. 48:3-61, absent the issuance of transition bonds providing for the recovery of its Bondable Stranded Costs as set forth in paragraph l(b); and

c) We note that market interest rates are subject to volatility, and the actual interest rates on the transition bonds are not known at this time. Accordingly, it is impossible to reach final determinations at this time with respect to the actual level of savings and benefits associated with the issuance of transition bonds by PSE&G. Indeed, to the extent that the interest rate on the bonds is not fixed until the time of the pricing of the terms and conditions of the transition bonds, such final determinations with respect to savings and benefits could be

problematic even at the date of the issuance by the Board of a financing Order. In order to be able to address this issue definitively in the financing Order, recognizing the inherent volatility of market interest rates, we will determine in the financing Order an upper bound for the actual interest rate on the bonds, at or below which would result in a level of savings and benefits for ratepayers which the Board deems appropriate in accordance with the provisions of the Act.

13) Pursuant to paragraph 10, in accordance with section 13 of the Act,, N.J.S.A. 48:3-61, and on the condition that the Genco transfer is implemented, and the unsecuritized generation stranded cost level is not subject to true-up (other than as provided in paragraph 17 hereinbelow), PSE&G shall be provided with the opportunity to recover up to $540 million of its unsecuritized generation stranded costs on a net present value (8.42% discount rate) net of tax basis over the Transition Period. This recovery is to be accomplished via a 2 mill per kwh retail adder, an explicit Market Transition Charge (MTC), exclusive of the NTC, as discussed in Attachment 2 to the PSE&G Stipulation, and the amount funded by the excess distribution depreciation reserve amortization. As Basic Generation Service (BGS) customers leave PSE&G for third-party suppliers, full recovery of these costs is not assured and represents a risk of undercollection to PSE&G.

14) At the end of the Transition Period, the recovery of the $540 million will be reconciled to actual collections based on actual sales, the net present value of recovery from both the MTC, exclusive of the NTC, and collections from a 2.0 mill per kwh retail adder for all customers retained on the BGS.

and the depreciation amortization. In the event the Company fails to collect $540 million, it will be at risk for any such shortfall. In the event the Company collects over $540 million, it shall use any such overrecovery to reduce the Company's SBC at the end of the Transition Period when the SBC is reset and shall in no event be retained by PSE&G or remitted to Geneco or otherwise utilized to recover unsecuritized generation-related stranded costs. The discount rate used in these present value calculations will be based on the same cost of capital/discount rate used to calculate securitization savings on Attachment 1 to the PSE&G Stipulation.

15) The Company's shopping credit shall equal its BGS rate, which shall be inclusive of an allowance for the cost of energy, capacity, transmission, ancillary services, losses, taxes and retail adder. The Company's BGS/shopping credit levels shall be established and fixed for the duration of the transition period, without adjustment or true up of any kind, as follows:

	Aug-Dec 1999	Jan-Dec 2000	Jan-Dec 2001	Jan-Dec 2002	Jan-Jul 2003
RS	5.71	5.86	5.86	5.86	5.86
GLP	5.30	5.35	5.39	5.44	5.44
LPL-S	4.84	4.88	4.93	4.97	4.97
LPL-P	4.54	4.58	4.62	4.66	4.66
HTS-SubT	4.30	4.35	4.40	4.44	4.44
HTS-HV	4.12	4.16	4.21	4.25	4.25
Overall	**4.95**	**5.03**	**5.06**	**5.10**	**5.10**

The above rates are rate schedule averages, which will differ by blocks and time periods of each rate schedule as defined in Attachment 2. Other rate schedules (RHS, RLM, WH, WHS, HS, BPL and PSAL) will be calculated consistent with the above as presented in Attachment 2 of the Stipulation. Additional shopping related savings, resulting from customers receiving electric generation service from a supplier at a price less than the above shopping credits, are above and beyond the rate reductions set forth in paragraph 1.

16) The above-referenced pre-established BGS rates meet the shopping credit definition in the Act and resolve the issue of BGS pricing and the shopping credit in a manner that accommodates the parties' concerns and satisfies the requirements of subsections 9(a) and 9(d) of the Act, N.J.S.A. 48:3-57(a) and (d).

17) Basic Generation Service Obligation -- Pursuant to subsections 9(a) and 9(b)(3) of the Act, N.J.S.A. 48:3-57(a) and (b)(3), the Company has a three-year

obligation to provide BGS to those retail customers who choose to remain with the utility during the three-year period ending July 31, 2002. The BGS to be provided after July 31, 2002 shall be bid out. The first year bid will be a pre-payment method based upon pre-established shopping credit for year four. If the bid for generation results in a payment to PSE&G, it shall be credited to the deferred SBC balance for purposes of establishing the SBC rate in year five. If the bid for generation requires a payment by PSE&G, such payment shall be subject to deferral and subsequent recovery at the Interest Rate. A non-regulated affiliate of Public Service Enterprise Group, Inc. will be authorized to bid for such BGS to be provided after July 31, 2002 pursuant to terms that apply to other suppliers of electricity, subject to procedures to be determined by the Board.

18) PSE&G shall not promote its BGS as a competitive alternative.

19) Pursuant to the provision of subsection 7(d) of the Act, N.J.S.A. 48:3-55(d), the Board approves the transfer of the Company's electric generation-related assets and their operation, and all associated rights and liabilities into a separate corporate entity or entities (Genco) to be wholly owned by Public Service Enterprise Group, Inc. and not by Public Service Electric and Gas Company. The specific generation facilities and assets which shall be transferred are identified on Attachment 3 to the Stipulation (the "Generation Facilities"). PSE&G represented that these facilities and assets constitute all of its electric generation related assets.

20) The final and fixed transfer value pursuant to subsections 7(d) and 13(e) of the Act, N.J.S.A. 48:3-55(d) and 61(e), for the Generation Facilities is $2.443 billion (Attachment 4 to the Stipulation as

modified pursuant to this Order) which is the fair market value of the assets transferred considering all revenues derived from the BGS contract described in paragraph 21 hereof. In addition, PSE&G will transfer at book value at the time of transfer other generation-related assets including materials, supplies, and fuel, which book value we find to be the full value for such generation-related assets, in accordance with subsection 7(d) of the Act, N.J.S.A. 48:3-55(d). Such transfer prices ensure that PSE&G receives full value for the Generation Facilities and related assets and that PSE&G will not retain any liabilities associated with the transferred Generation Facilities Or Other generation-related assets and shall assure that customers' responsibility for stranded costs is established at the lowest reasonable level. No land held for future use (Account 105) will be transferred to Genco. All generation-related expenses will be borne by Genco. The Company shall have auditable accounting protocols in place no later than the effective date of the transfer to assure that all expenses and capital expenditures related to generation will be borne by Genco.

21) The BGS contract between PSE&G and Genco will contain the following provisions:

To ensure the reliability of service to BGS and to remove the risk of price volatility o the regulated Company during the transition to a competitive market and to further ensure that PSE&G can meet its contractual obligations to provide power under certain Off-Tariff Rate Agreements (listed in Attachment 5 to the Stipulation), the transfer to the Genco shall 6e accompanied by the Genco and PSE&G's entering into a BGS contract which shall be submitted for approval to the Board, whereby the Genco would provide full requirements service for energy, capacity, losses and ancillary services needed by the Company for BGS and for Off-Tariff

Rate Agreements for the period that the Company will be providing BGS under the Stipulation;

b) In exchange for ensuring the reliability of supply for PSE&G's BGS, for removing the risk of price volatility from the regulated Company in providing such service and to further ensure that PSE&G can meet its contractual obligations in its Off-Tariff Rate Agreements, the BGS contract shall provide that the consideration paid by PSE&G for such full requirements service shall be: (1) an amount computed on a monthly basis equal to the full amount charged for BGS to PSE&G's retail electric customers as set forth in paragraph 15 (less any sales and use tax and transmission); (ii) an amount computed on a monthly basis equal to PSE&G's retail delivery to Off-Tariff Rate Agreement customers, multiplied by the comparable BGS rate for such customers (less sales and use tax and transmission); and (iii) an additional charge for-price stability services provided by the combustion turbine assets of Genco, payable based on the installed capacity of those assets. The additional charge, set forth in (iii) above, will be an amount computed on a monthly basis equal to the full actual amount collected pursuant to paragraph 13 excluding the 2 mill per kwh retail adder. Pursuant to subsection 9(b)(3) of the Act, N.J.S.A. 48:3-57(b)(3), no net revenue from this contract may be used as a reduction of the MTC or distribution rates.

c) To further ensure the reliability of supply for PSE&G's BGS and to remove the risk of price volatility from PSE&G, the BGS contract shall also provide that PSE&G shall transfer to

Genco, solely for the purpose of Genco meeting its obligations under the BGS contract, including the removal of price volatility, the authority to act as its agent for the purpose of scheduling, electing and/or using all rights, including Fixed Transmission Rights, associated with transmission delivery of full requirements service for PSE&G's BGS and Off-Tariff Rate Agreement customers. Genco will be responsible for costs related to BGS scheduling activities to the same degree it would be responsible for those costs for other load serving entities.

d) The BGS contract shall be filed with the Board for review and approval to ensure its consistency with the letter and intent of this Order. The parties shall have the right to comment to the Board on terms and conditions which are reflected in the BGS contract but which are not set forth herein.

22) To further ensure the reliability of the BGS after the transfer of the Generation Facilities, PSE&G shall continue to supply, on an as needed basis, dedicated intrastate natural gas transportation services for the Genco's own gas supplies from PSE&G's city gate to the transferred generating facilities in accordance with the Stipulation approved in Docket No. ER94070293, OAL Docket No. PUC 7328-94 on May 5, 1995. Such dedicated intrastate natural gas transportation services shall continue to be supplied by PSE&G to Genco for the term of the BGS contract.

23) To ensure that the goals of reliable service and sustained rate reductions are achieved, the transferred Generation Facilities may only be sold or otherwise transferred by Genco to any other party during the Transition Period if the other party

agrees to take the Generation Facilities subject to entering into a comparable BGS contract with the same consideration including the right to recover the MTC allocated to such Generation Facilities. Said contract shall be subject to review and approval by the Board to assure such comparability and to otherwise ensure that the PSE&G customers receive at least the same level of benefits as attendant to the BGS contract between PSE&G and Genco. If a sale of some or any of the transferred Generating Facilities by Genco occurs within five years of August 1, 1999, any net after tax gains from such sale will be shared equally between shareholders and customers in a manner to be determined by the Board.

24) The Board finds that qualifying the Generation Facilities being transferred, either separately or jointly, in accordance with section 32(c) of the Public Utility Holding Company Act of 1935 as Exempt Wholesale Generators will benefit consumers, is in the public interest, will not provide any unfair competitive advantage by virtue of the Genco's affiliation or association with the Company subject to compliance with affiliate relations and fair competition standards to be adopted by the Board, and does not violate State law. As an EWG, Genco shall not offer retail electric service.

25) The Board finds that, in accordance with section 32(k) of the Public Utility Holding Company Act of 1935, it has sufficient regulatory authority, resources and access to books and records of Public Service Electric and Gas Company and any relevant associate, affiliate or subsidiary company, to ensure that the BGS contract will (a) benefit consumers; (b) not violate any State law; (c) not provide Genco any unfair competitive advantage by virtue of its

affiliation or association with the Company; and (d) is in the public interest.

26) PSE&G shall submit, within 60 days of the date of issuance of the Board's Order, a tentative schedule for the receipt of authorization for the transfer from other agencies for the Generation Facilities described in Attachment 3 to the Stipulation. PSE&G shall submit to the Board copies of any filings made to other agencies seeking authorization of the transfer, in order to assure that no material changes to the terms and conditions attendant to this Order are being sought. Within 60 days following approval, PSE&G shall also file with the Board copies of any documents evidencing such transfer and assumption of liabilities in connection therewith. Upon the receipt of approval from other agencies, PSE&G shall provide a filing, which reflects the terms and the approvals received and accounting implemented.

27) In order to ensure that PSE&G does not retain any risks or liabilities associated with the electric generating business after the Generating Facilities have been transferred, the Board hereby orders that all contracts (except for the NUG contracts) associated with the electric generating business, including, but not limited to, wholesale electric purchase and sales agreements, fuel contracts, real and personal property interests, and other contractual rights and liabilities, be transferred from PSE&G to Genco simultaneous with the transfer of all generating assets, and to substitute the Genco for PSE&G as the party(s) to any such contracts.

28) The Board recognizes that various federal and state regulatory approvals, as well as third-party consents, will be necessary to complete the transfer of assets, rights and obligations contemplated by this Order and anticipates that such approvals and

consents will result in a delay between the date of this Order approving the transfer and the date that the Generation Facilities are actually transferred. The Board finds that PSE&G will receive from Genco the full market value of the generating assets, and that such receipt will be reflected as an offset to the MTC charged by PSE&G to recover unsecuritized stranded costs. Accordingly, and in order to effectuate the purposes of the Act under subsection 9(b)(3), N.J.S.A. 48:3-57(b)(3), and to ensure that PSE&G is not unduly penalized while diligently complying with this Order and supplying BGS at rates approved by the Board, any requirement under section 7 of the Act, N.J.S.A. 48:3-55, which would require the payment of any percentage of net revenues for the sharing of common assets and personnel is not applicable, provided that the transfer is completed within one year of the date of this Order, unless extended by further Order of the Board.

29) Generating capacity transferred to Genco shall be maintained as a capacity resource within the PJM system for the Transition Period. During that period, Genco will be permitted to sell said capacity outside of the PJM system for periods of less than one year after it makes good faith efforts to sell the transferred capacity into the PJM system at market rates. For purposes of implementing this Order, the Board will retain jurisdiction over and will monitor whether Genco is complying with the terms of this Order during the Transition Period to sell excess capacity into the PJM system at market prices.

30) In addition to any other Affiliate Standard of Conduct that might apply to PSE&G, the relationship and any transactions between PSE&G and Genco, except as such relationship is defined in the BGS contract, as reviewed and approved by the

Board, will be governed by the affiliate relations standards adopted by the Board pursuant to section 8 of the Act, N.J.S.A. 48:3-56.

31) The transfer of Generation Facilities and related rights and liabilities contemplated by this Order is in the public interest and will not jeopardize the reliability of the electric power system. Such transfer will not adversely impact the ability of PSE&G to meet its obligations to its employees with respect to pension benefits, as contemplated pursuant to N.J.S.A. 48:3-7.

32) The advertising requirements under N.J.A.C. 14:1-5.6 are waived because of the extensive nature of the record regarding valuation of the assets being transferred and no further authorizations by the Board are required to effectuate this transfer provided that all other regulatory approvals are obtained on a basis consistent with this Order.

33) Upon the transfer of the nuclear generation assets, neither PSE&G nor its retail customers shall be responsible to decommission its previously owned nuclear units, subject to the Nuclear Regulatory Commission approval. That responsibility will pass to the Genco with the transfer of the nuclear generation and associated assets described in Attachment 3 to the Stipulation and the Nuclear Decommissioning Trust Funds.

34) The Third Party Supplier Agreements are subject to an ongoing generic working group under the Board's restructuring dockets. We will determine the contents and substance of the Third Party Agreement and accompanying tariffs within the context of that generic proceedings.[9]

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[9] The four electric public utilities and a majority of active third party suppliers in fact reached agreement on a Master Third Party Supplier

35) The Board will work closely and cooperatively with the PJM-ISO to monitor actual market behavior in connection with the PJM-ISO's FERC-ordered market monitoring plan.

36) The Board directs the parties to work cooperatively to conclude the billing and metering proceeding in an expedited fashion, which proceeding the Board will endeavor to conclude by May 1, 2000, but in any event shall conclude by August 1, 2000 pursuant to section 6 of the Act, N.J.S.A. 48:3-54.

37) The Board directs PSE&G to seek a letter ruling from the IRS to determine whether or not the value of the ITC can legitimately be credited to customers without violating the tax normalization policies of that agency to the detriment of the Company and its customers.

In summary, subject to the conditions embodied herein, the rate discounts provided by PSE&G relative to current rates during the Transition Period shall be as follows:

August 1, 1999	5%
January 1, 2000	7% (minimum)
August 1, -2001	9% (minimum)
August 1, 2002	13.9%

The average shopping credits shall be as follows:

	1999	2000	2001	2002	2003
RS	5.71	5.86	5.86	5.86	5.86
GLP	5.30	5.35	5.39	5.44	5.44
LPL-S	4.84	4.88	4.93	4.97	4.97
LPL-P	4.54	4.58	4.62	4.66	4.66
HTS-SubT	4.30	4.35	4.40	4.44	4.44

Agreement and accompanying tariffs, which was approved by the Board at its July 26, 1999 public agenda meeting.

HTS-HV	4.12	4.16	4.21	4.25	4.25
Overall	**4.95**	**5.03**	**5.06**	**5.10**	**5.10**

The opportunity for recovery of up to $2.94 billion of net of tax generation stranded costs is afforded via $2.4 billion of securitization and the opportunity for up to $540 million to be recovered via the MTC, the retained retail adder and the depreciation reserve amortization and subsequently remitted to Genco, per the terms of the Stipulation as modified.

The total opportunity for recovery of net of tax generation stranded costs is set at $2.94 billion, with the implementation of the Genco transfer, resulting from an increase in the net transfer value for the generating assets of $135 million from $1.768 billion to $1.903 billion.

The amount of generation stranded costs which is authorized for securitization is $2.4 billion. The Company is also authorized to securitize up to the estimated $125 million of reasonably incurred bond transaction costs.

The amount of unsecuritized net of tax stranded cost which the Company is permitted an opportunity to recover is $540 million, with the implementation of the Genco transfer per the terms of the Stipulation as modified herein, and subject to the true-up provisions provided in paragraph 17 of the Stipulation as modified herein.

DATED: August 24, 1999

BOARD OF PUBLIC UTILITIES
BY:

/s/_____
HERBERT H. TATE
PRESIDENT

/s/_____
CARMEN J. ARMENTI
COMMISSIONER

/s/_____
FREDERICK F. BUTLER
COMMISSIONER

ATTEST: /s/_____
MARK W. MUSSER
SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities

/s/_____

BPU Summary Order (Doc. A-1108-99T3)
Dated April 21, 1999

Agenda Date: 4/21/99

STATE OF NEW JERSEY
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

ENERGY

IN THE MATTER OF PUBLIC SERVICE) ELECTRIC AND GAS COMPANY'S RATE UNBUNDLING, STRANDED COSTS AND RESTRUCTURING FILINGS	) **SUMMARY ORDER**) BPU DOCKET NOS.) E097070461,) EO97070462, AND) EO97070463

(SERVICE LIST ATTACHED)

BY THE BOARD:

This Summary Order memorializes in summary fashion the action taken by the Board of Public Utilities ("Board") in these matters at its April 21, 1999 public agenda meeting. The Board will issue a more detailed Decision and Order in these matters in the near future, which will provide a full discussion of the issues as well as the reasoning for the Board's determinations.

These matters come before the Board on a record developed in hearings before Administrative Law Judge ("ALJ") Louis G. McAfoos, who issued an Initial Decision ("ID") on August 14, 1998, and in hearings conducted before Commissioner Carmen J. Armenti from April 27, 1998

through May 28, 1998. Subsequent to the ALJ's ID and the hearings before Commissioner Armenti, the Legislature passed and Governor Whitman signed into law on February 9, 1999 the Electric Discount and Energy Competition Act ("the Act"). Negotiations were conducted during the latter part of February and the first half of March 1999. A comprehensive settlement was not reached, but on March 17, 1999 a Stipulation was filed by Public Service Electric and Gas Company ("PSE&G") on behalf of a number of parties to the proceedings. On March 29, 1999 an alternative joint proposal was submitted by the Division of the Ratepayer Advocate (Advocate) on behalf a number of other parties to these proceedings. Comments directed at the two competing proposals were solicited by the Board and submitted by numerous parties on April 5 and April 7, 1999, respectively.

Based on its review of the extensive record in these proceedings, as well as the comments submitted, the Board is not fully satisfied that either proposal in its entirety represents an appropriate resolution of these proceedings. However, the Board finds the March 17, 1999 Stipulation sponsored by PSE&G and others to be overall more financially prudent and consistent with the Act's requirements, consistent with the record and, with the modifications and clarifications set forth hereinbelow, provides the framework for a reasonable resolution of these matters based upon the record before us. Conversely, we find the Stipulation sponsored by the Advocate and others to be, in many significant areas, not supported by the record, reliant upon miscalculations and inappropriate assumptions or conclusions, and not reflective of a balanced consideration of all the issues in these matters. However, the proponents of the Advocate-sponsored stipulation and other parties have raised a number of legitimate concerns regarding the PSE&G-sponsored Stipulation which merit serious consideration and which, where appropriate, have been addressed by the modifications and clarifications set forth below.

Accordingly, except as specifically noted below, and as will be further explained in a detailed order which shall be issued we hereby incorporate by reference as if completely set forth herein, as a fair resolution of the issues in these proceedings the elements of the Stipulation filed by PSE&G and others, and to the extent the Initial Decision is inconsistent herewith, as it is modified to conform herewith.

The modifications and clarifications to the Stipulation are summarized as follows:

Paragraph l.b): We find that all rate reductions after the August 1, 1999 statutorily mandated rate reduction should not be subject unconditionally to implementation of the transition bond charge. The 7% estimated aggregate rate reduction in January 2000, as well as the 8.25% aggregate rate reduction (as adjusted below) in August 2001, does include achievement of an estimated 2% overall savings from securitization in addition to the 1% securitization savings subsumed in the initial 5% rate reduction in August 1999. Accordingly, to the extent that securitization is not implemented, those middle rate reduction steps would appropriately be reduced by 2%. The final rate reduction in August 2002 of 13.9% (10% from the level of April 30, 1997 rates), is required by the Act and shall not be conditioned upon implementation of securitization.

Paragraph l.c): Subject to the foregoing, we modify the August 1, 2001 rate reduction from 8.25% to 9.00%.

Paragraphs l.e) and 3: We accept the manner in which the Stipulation applies the rate reductions to customer bills during the transition period, but are concerned that the removal of the rate reduction credit in year 5 will lead to an undue bill impact, since removal of the entire rate reduction credit would appear to result in a total customer bill which substantially exceeds the sum of the unbundled rate components, including the distribution rate, BGS rate (including transmission), STC, NTC, and

SBC which will remain, prior to adjustment, in year 5. Moreover, we are concerned that the particular unbundled rate components, particularly with respect to distribution charges, as provided in Attachment 2 will, after the expiration of the rate reduction credit, result in a shift in cost responsibility between and among customer classes. We therefore DIRECT the Company to file, by no later than March 1, 2000, a revised distribution rate design, for Board review and approval, which does not result in a shift of cost responsibility between or among customer classes. Moreover, we DIRECT the Company to file, by no later than August 1, 2002, the proposed unbundled rate components which it proposes be implemented at the expiration of the transition period on August 1, 2003.

Paragraph 10: The Board concludes that the Company should be provided with the opportunity to recover up to $2.940 billion net of tax stranded costs, through securitization of $2.400 billion and an opportunity to recover up to $540 million of its unsecuritized generation related net of tax stranded costs on a present value basis, subject to a true-up on the collection of the unsecuritized generation related stranded costs as provided in Paragraph 17 of the Stipulation. As well, the overrecovery in the LEAC as of July 31, 1999 totaling approximately $60 million (as estimated in the Stipulation net of taxes) should not be used as a mitigation tool for the Company; rather, it should be returned to ratepayers and utilized to offset the stranded costs otherwise recoverable from ratepayers. This shall be accomplished by applying the overrecovery as a credit to the starting deferred balance for the NTC.

Paragraph 11: The Board clarifies the language concerning the use of the net proceeds of securitization, to indicate that the refinancing or retirement of debt and/or equity shall be done in a manner that will not

substantially alter the Company's overall capital structure.

Paragraph 11.a): The Board will issue a financing order, consistent with the provisions of the Act, to authorize the Company to issue up to $2.525 billion of transition bonds representing $2.400 billion of net of tax generation-related stranded costs and an estimated $125 million of transaction costs. The taxes related to securitization, which reflect the grossed up revenue requirement number associated with the $2.400 billion in net of tax stranded costs being securitized, are legitimate recoverable stranded costs, however they should not be collected through the transition bond charge; rather, such taxes shall be collected via a separate MTC. The duration of this separate MTC shall be 15 years, identical to the duration of the transition bond charge. An MTC of a shorter duration will prevent the achievement of the mandated rate reductions.

Paragraph 13: We believe that, on the condition that the Genco transfer is implemented, and the unsecuritized generation stranded costs level, once established, is not subject to true-up, other than as provided in Paragraph 17 (as modified), PSE&G should only be afforded the opportunity to recover $540 million on a net present value basis (not including the tax-related MTC addressed in Paragraph 11 (a)) of unsecuritized generation-related stranded costs, net of taxes, over the Transition Period.

Paragraph 14: Consistent with our modifications to paragraph 13, references to $600 million shall be modified to $540 million. In addition, we modify the stipulation and clarify that any payments to PSE&G resulting from BGS being bid out for year 4 of the transition period pursuant to paragraph 17 shall be credited to the deferred SBC balance for purposes of establishing the SBC rate in Year 5, and shall in no event be retained by the Company or remitted to Genco or

otherwise utilized to recover unsecuritized generation-related stranded costs.

Paragraph 21.c: With respect to the fixed transmission rights, we clarify that the transfer of authority to Genco to act as PSE&G's agent for the purpose of scheduling, electing and/or using such rights, is solely for the purpose of Genco meeting its obligations under the BGS contract, including the removal of price volatility.

Paragraph 23: We believe that there should be an equal sharing of the gains from any sale of the transferred generating facilities which occurs within 5 years of August 1, 1999, rather than within four years as proposed in the Stipulation.

Paragraph 28: We clarify that it is our belief that, under the terms and conditions of our Order, and the resultant facts and circumstances, section 7 of the Act concerning the sharing of net revenues is not applicable.

Paragraph 29: We clarify that, for purposes of implementing the Stipulation, the Board will retain jurisdiction over and will monitor whether Genco is making good faith efforts to sell excess capacity into the PJM system at market rates.

Paragraphs 30 and 30A: The Board accepts neither proposed standards of conduct in the Stipulation, but instead indicates that it has released draft affiliate relations standards for comment, and will be adopting interim affiliate relations standards pursuant to the Act prior to the completion of the transfer, and that such standards will be applied to the relationship between Genco and PSE&G, except as such relationship is defined in the BGS contract. The Company shall file the proposed BGS contract for the Board's review for compliance with the provisions of its Decision and Order in this matter.

Paragraph 34: The Third Party Supplier Agreements are subject to an ongoing generic working group under the Board's restructuring dockets. Accordingly, we do not approve or give any particular weight to the tariff modifications in Attachment 6 to the Stipulation; we will determine the contents and substance of the Third Party Supplier Agreement and accompanying tariffs within the context of that generic proceeding. We encourage the parties to work cooperatively to resolve those issues in a collaborative manner.

In summary, subject to the conditions embodied herein, the rate discounts provided by PSE&G relative to current rates shall be as follows, assuming 3% savings from securitization:

August 1, 1999	5%
January 1, 2000 (est'd)	7%
August 1, 2001 (est'd)	9%
August 1, 2002	13.9%

The average shopping credits shall be as follows:

	1999	2000	2001	2002	2003
RS	5.71	5.86	5.86	5.86	5.86
GLP	5.30	5.35	5.39	5.44	5.44
LPL-S	4.84	4.88	4.93	4.97	4.97
LPL-P	4.54	4.58	4.62	4.66	4.66
HTS-Sub T	4.30	4.35	4.40	4.44	4.44
HTS-HV	4.12	4.16	4.21	4.25	4.25
Overall	4.95	5.03	5.06	5.10	5.10

The opportunity for recovery of up to $2.940 billion is afforded via $2.400 billion of securitization and the opportunity for up to $540 million to be recovered via the MTC, the retained retail adder and the depreciation reserve amortization and subsequently remitted to Genco, per the terms of the stipulation as modified.

The total opportunity for recovery of net of tax generation stranded costs is set at $2.940 billion, with the implementation of the Genco transfer, resulting from an increase in the net transfer value for the generating assets of $135 million from $1.768 billion to $1.903 billion.

The amount of generation stranded costs which is authorized for securitization is $2.400 billion. The Company is also authorized to securitize up to the estimated $125 million of reasonably incurred bond transaction costs.

The amount of unsecuritized net of tax stranded cost which the Company is permitted an opportunity to recover is $540 million, with the implementation of the Genco transfer per the terms of the Stipulation as modified herein, and subject to the true-up provisions provided in paragraph 17 of the Stipulation as modified herein.

Within five (5) days of the date of this Order, the Company is **HEREBY DIRECTED** to submit to the Board schedules that show all accounting entries that will be required as a result of this Order, for both PSE&G and Genco, including the entries that will be required on the dates the securitization and Genco proceeds are projected to be received by the Company. In all cases, the information is to include all tax effects, both current and deferred, and the disposition of the accumulated balance of investment tax credits associated with the assets transferred and related annual amortization, if any, and all of the information, for both the Company and Genco, is to be quantified reflecting the findings of this Order, as set forth above. The Company shall consult with Staff to assure the adequacy of the required submissions.

DATED: April 21, 1999

BOARD OF PUBLIC UTILITIES
BY: /s/_____

/s/_____
HERBERT H. TATE
PRESIDENT

/s/_____
CARMEN J. ARMENTI
COMMISSIONER

/s/_____
FREDERICK F. BUTLER
COMMISSIONER

ATTEST: _____
MARK W. MUSSER
SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities

/s/_____

Agenda Date: March 24, 1999

STATE OF NEW JERSEY
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

ENERGY

ORDER DENYING MOTION

IN THE MATTER OF THE	) OAL DKT. NOS.
FUTURE STRUCTURE OF THE	) PUC 7347-97N
ELECTRIC POWER INDUSTRY:	) PUC 7348-97N;
UNBUNDLED AND STRANDED	
COSTS PROCEEDINGS OF	
PUBLIC SERVICE ELECTRIC	) BPU DKT NOS.
AND GAS COMPANY	) EO97070461
	) EO97070462;

(SERVICE LIST ATTACHED)

BY THE BOARD:

By Order dated April 30, 1997, in Dkt. No. EX94120585Y, the Board of Public Utilities ("Board" or "BPU"), determined, after a 23-month investigation, to adopt and release a report entitled Restructuring the Electric Power Industry in New Jersey: Findings and Recommendations ("Restructuring Report"). Said Order further required the State's four investor-owned electric utilities, including Public Service Electric and Gas Company ("PSE&G"), to file, by July 15, 1997, unbundling filings, stranded cost filings and restructuring plans in accordance with the time schedule,

guidelines, and parameters set forth in the Restructuring Report.

By Order dated July 11, 1997, the Board determined that the unbundled rates and stranded costs filings would be transmitted to the Office of Administrative Law ("OAL,") as contested cases. The restructuring plans were retained by the Board for hearings. Numerous parties moved to intervene in each of these proceedings and were granted intervenor or participant status.

On August 17, 1998, after extensive discovery, evidentiary hearings and opportunity for briefing at the OAL, Administrative Law Judge Louis T. McAfoos Jr., t/a, issued an Initial Decision with respect to PSE&G's unbundling and stranded cost filings. Exceptions and Replies to Exceptions were filed by the various parties. The Initial Decision is pending before the Board.

On February 9, 1999, Governor Whitman signed into law the "Electric Discount and Energy Competition Act," P.L. 1999, c.23 (the "Act"). The Act requires that, by Order, the Board shall provide that by August 1, 1999, each electric public utility shall provide retail choice of electric power suppliers for its customers. In order for competition to commence as scheduled, the Act provides that the Board must render a determination as to the appropriate unbundled rates (Section 4) and stranded costs (Section 13) for each of the four utilities.

On February 11, 1999, the Board established a schedule for the parties to attempt settlement of the unbundling and stranded cost proceedings for each utility and, in the absence of settlement, for decision by the Board. For PSE&G, the deadline for settlement was March 3, 1999, which was subsequently extended to March 5, 1999. The target decision date for PSE&G was set as March 31, 1999. No settlement was reached by the deadline date; however thereafter, a stipulation was entered into among some, but not all of the

parties, and was submitted to the Board and the parties by PSE&G on March 17, 1999.

By letter dated March 8, 1999, the Mid-Atlantic Power Supply Association ("MAPSA") moved to reopen and supplement the record in the PSE&G unbundling and stranded cost proceedings to receive additional updated evidence on: 1) stranded cost data, which MAPSA asserts should be updated to reflect current information concerning undocumented market values achieved in certain proposed fossil fuel generating plant sales; and 2) the appropriate level of the so-called "shopping credit," which the Board is specifically required to establish under the Act. MAPSA's motion was not supported by an affidavit alleging new facts or circumstances, but rather, attached what appears to be a press release from GPU Energy announcing that it had signed agreements to sell the remainder of its fossil-fueled and hydroelectric generating assets for $1.72 billion.

By letter dated March 11, 1999, the Ratepayer Advocate ("RA") filed a letter memorandum in support of MAPSA's motion. The Ratepayer Advocate concurs with MAPSA that the Board should reopen the record to receive additional information on the above-described two issues and, in addition, argues that the Board should also reopen the record to: 1) reflect current financial data in order to satisfy the Act's requirement that the Board consider the financial integrity of the electric utility in its determination of the appropriate level of stranded cost recovery; and 2) take "official administrative notice" of the fact that PSE&G failed to comply with the Board's Final Order in the 1997 Salem Outage case requiring it to reset its Levelized Energy Adjustment Clause (LEAC) rate via a filing in late 1998 to be effective January 1, 1999.

The New Jersey Business Users ("NJBUS") filed a letter in support of MAPSA's motion, arguing that the record requires supplementation with regard to evidence of the appropriate level of the shopping credit and with regard to stranded costs. NJBUS further argues that other provisions of the Act may also require additional evidence and findings

with respect to securitization, beyond what was contemplated prior to its enactment.

Atlantic City Electric Company ("ACE") also filed comments in response to MAPSA's motion. ACE notes that the MAPSA motion "raises legitimate issues," but stops short of supporting a reopening. ACE acknowledges that reopening the proceeding would pose a "practical dilemma" in meeting the August 1 deadline for competition, but argues that due process rights must not be "sacrificed in a well-intentioned rush to comply with legislative mandates."

By letters dated March 16 and 22, 1999, PSE&G filed responses in opposition to the arguments of MAPSA, the RA and the NJBUS. PSE&G contends that the standard for granting a motion to reopen has not been met; that the market value of the Company's power plants was extensively litigated in the proceedings below and that the introduction of isolated evidence of proposed power plant sales would delay the proceedings and add nothing material to the Board's deliberations; that the record in the proceedings below includes ample evidence on the impact of the shopping credit on competition and the relevant evidence for determining the market price of power and the retail adder as they relate to setting the shopping credit; and that factors relating to the financial integrity of the Company have been extensively litigated in the proceedings below. PSE&G further argues that the RA's request to take judicial notice of PSE&G's alleged failure to comply with the Salem stipulation be denied, and that the Board should reject NJBUS' "open-ended and undefined invitation to reopen the record with regard to 'other provisions of the statute'."

Discussion and Findings

The Board is currently in the midst of reviewing the extensive record below in anticipation of issuing a decision in these matters in accordance with the target dates previously announced. Having reviewed the requirements of the Act and having carefully considered the arguments raised by

MAPSA, the Ratepayer Advocate, NJBUS, ACE and PSE&G, the Board is not convinced that the record in the unbundling and stranded cost dockets of PSE&G needs to be reopened at this time.

As a threshold matter, we are not convinced that the standard for granting a motion to reopen has been met. Pursuant to N.J.A.C. 1:1-18.5(b), motions to reopen a hearing after an initial decision have been filed must be addressed to the agency head. The Board's rules of practice, N.J.A.C. 14:1-8.4, allow for a motion to reopen a hearing for the purpose of taking additional evidence. The movant must "set forth clearly the reasons for reopening of the hearing, including any material changes of fact or law alleged to have occurred since the last hearing." The regulation further provides that "if, after the hearing in a proceeding, the Board shall have reason to believe that conditions of fact or law have so changed as to require, or that the public interest requires, the reopening of such hearing, the Board will issue an order for the reopening of same."

In this case, while undisputedly there has been new legislation enacted since the conclusion of the hearings, we do not find this, in and of itself, to be a sufficient basis to reopen the record. The record in this case clearly contemplated the enactment of comprehensive electric deregulation legislation. The hearings at the OAL were intended to develop an extensive record with respect to factual rate unbundling and stranded costs issues, while the restructuring plan hearings before the Board were intended to develop an extensive record on the more generic restructuring policy issues, all of which would then be used by the Board to develop a final order for each electric utility consistent with the legislative requirements, including the schedule laid out by the Legislature for the commencement of competition.

Moreover, Section 66 of the Act explicitly recognizes that the Board has been developing a record on these issues since April 30, 1997, and specifically confers on the Board, retroactively to April 30, 1997, the authority, to the extent

needed, to take such anticipatory regulatory action as the Board shall deem necessary to fulfill the requirements of the Act. The short time frame set by the Legislature for the commencement of competition takes into account the fact that an extensive record has already been developed by the Board on the relevant issues.

Based on our review of the Act and the record below, we find that the parties have had an extensive opportunity to litigate all relevant issues through discovery, the filing of testimony, many days of evidentiary hearings, cross-examination, initial and reply briefs and Exceptions and Reply Exceptions to the Initial Decision. The Board disagrees with and HEREBY REJECTS the generalized contentions of MAPSA, the Ratepayer Advocate, ACE, and NJBUS that the record needs to be reopened to comply with the requirements of the Act and/or due process. We now turn to the specific bases on which MAPSA, the Ratepayer Advocate and NJBUS submit that the record should be reopened.[1]

1. Stranded Cost Calculation

MAPSA argues that current market based data with respect to fossil fuel plant valuation is markedly different from the data in the record, but offers nothing more than a press release by GPU Energy from an internet site in support of its motion. In the OAL proceedings, a number of parties submitted extensive expert testimony and employed various modeling techniques which were subject to discovery and cross-examination to value each eligible PSE&G generating asset over its remaining useful life. We FIND that neither MAPSA nor the RA has sufficiently demonstrated in its

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[1] Our decision herein does not address the concerns raised by the Ratepayer Advocate in its March 23, 1999 letter relating to the proposed transfer of generating assets contemplated by the stipulation submitted by some of the parties on March 17, 1999. In a separate ruling, the Board has determined to allow interested parties an opportunity to comment on said stipulation by April 5, 1999. The within Order is without prejudice to the submission and review of such comments.

papers how or why evidence of recent sales or proposed sales, for which no showing has been made as to their comparability to PSE&G's plants, is relevant or material to the issues before us. The mere fact that an agreement may have been entered into for the sale of another plant in another location at a price above the seller's book value does not, in and of itself, provide useful evidence of the value of another facility with different characteristics. In our view, there has been no showing sufficient to require the reopening the record on this issue.

2. Shopping Credit

We disagree with MAPSA's and the RA's contentions that the Act's requirement to set a shopping credit consistent with the pro-competitive goals of the Act requires reopening of the record. The Board has consistently expressed its intent to move towards a competitive energy market and the impact of the shopping credit or the Basic Generation Service ("BGS") rate on the development of competition was addressed extensively in the record below by a number of witnesses, including witnesses for MAPSA and the RA. Moreover, we FIND that there is sufficient and substantial evidence in the record to determine the market based cost of power to be used to establish a BGS rate or shopping credit as that term is defined in Section 3 of the Act. Additionally, we FIND that there is already sufficient information in the record to determine the retail ancillary and administrative costs to be included in the BGS rate/shopping credit.

3. Financial Condition

The parties have already submitted testimony concerning the financial integrity of PSE&G and the financial implications of the various rate reduction and stranded cost recovery proposals on the record for consideration in our determination of the appropriate level of stranded cost recovery. We FIND no basis to require that the record be supplemented to reopen the record concerning the financial integrity of the Company. The RA has not identified any

material changes of fact or law requiring such a reopening, which would inevitably lead to substantial delay of the case.

4. LEAC Issues

The Board is fully cognizant of the requirements of our Salem decision resolving our investigation of the used and usefulness of Salem 1 and 2 nuclear units in light of the extended outages at those facilities. We are further cognizant of the proposal which PSE&G has made in its initial filing in these proceedings with respect to the LEAC. We FIND that this issue is already before us and that there is no need to reopen the record or to take any new or additional official notice with respect to this issue.

5. Securitization

We reject NJBUS' unsupported argument that the Board must reopen the record in order to make certain findings required by the Act with respect to securitization. We FIND that the current record is sufficiently developed on this issue to allow the Board to make the findings required by the Act.

Accordingly, for the above reasons, the Board rejects the arguments in support of reopening the record in this matter and therefor, motion to reopen the record with respect to the above described issues is HEREBY DENIED.

Commissioner Frederick F. Butler has determined to abstain in this matter.

DATED: March 25, 1999 BOARD OF PUBLIC UTILITIES

BY:
/s/_____

HERBERT H. TATE
PRESIDENT

/s/_____
CARMEN J. ARMENTI
COMMISSIONER

ATTEST: /s/_____
MARK W. MUSSER
SECRETARY

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

IN THE MATTER OF PUBLIC	)	BPU Docket No.
SERVICE ELECTRIC AND	)	EO97070461
GAS COMPANY	)	OAL Docket No.
UNBUNDLED RATES FILING	)	PUC 7348-97
	)	
IN THE MATTER OF PUBLIC	)	BPU Docket No.
SERVICE ELECTRIC AND	)	EO97070462
GAS COMPANY STRANDED	)	OAL Docket No.
COSTS FILING	)	PUC 7347-97

SUR-REBUTTAL TESTIMONY
OF
SCOTT NORWOOD
ON BEHALF OF
CO-STEEL RARITAN

JANUARY 26, 1998

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EXHIBITS

DSN-1 ESTIMATED ANNUAL IMPACT OF PSE&G STRANDED COST RECOVERY CHARGES ON CO-STEEL RARITAN AFTER 2005

I. INTRODUCTION

Q. PLEASE STATE YOUR NAME, TITLE AND BUSINESS ADDRESS.

A. My name is Don Scott Norwood. I am a Principal of GDS Associates, Inc. My business address is 919 Congress Avenue, Suite 800, Austin, Texas, 78701.

Q. PLEASE SUMMARIZE YOUR EDUCATIONAL BACKGROUND AND PROFESSIONAL EXPERIENCE.

A. I am an electrical engineer with over 17 years of experience in the electric utility industry. After earning my engineering degree from the University of Texas in 1980, I was employed by Austin Electric Utility (AEU) as a Power Plant Engineer in the AEU's Power Production Division. In this position, I was responsible for electrical design and maintenance projects at the City's three gas-fired power plants. In 1984, I joined the Staff of the Public Utility Commission of Texas (PUCT). As Manager of Power Plant Engineering, I directed the PUCT Staff's analysis and testimony related to purchased power, resource planning and power plant construction and operational issues. I was a co-author of the PUCT's initial Statewide Energy Plan for Texas.

In July of 1986 I joined GDS Associates as a Project Manager in the firm's Generation Services Department, and was elected a Principal of the firm in 1990. My duties in eleven years with GDS have included expert analysis and testimony on power plant, purchased power and resource planning issues; power plant valuation and ownership

feasibility studies; operational monitoring and management consulting services for fossil and nuclear plant co-owners; and power supply procurement for public power clients.

My most recent work with GDS has focused on analysis of electric utility restructuring issues, including deregulated market price forecasting, stranded investment analysis and utility merger analysis. My resume is attached as Appendix A.

Q. PLEASE DESCRIBE GDS ASSOCIATES.

A. GDS is an engineering and consulting firm with offices in Marietta, Georgia, and Austin, Texas. GDS provides a variety of services to the electric utility industry including power supply planning, electric utility restructuring analysis, rates and regulatory consulting, financial analysis, load forecasting and statistical services. GDS also provides telephone, gas and water regulatory consulting services. The firm's client base consists mainly of electric cooperatives and municipal utilities, public service commissions and consumer interests.

Q. ON WHOSE BEHALF ARE YOU TESTIFYING?

A. I am presenting testimony on behalf of Co-Steel Raritan ("Co-Steel").

Q. HAVE YOU PREVIOUSLY TESTIFIED BEFORE THIS OR OTHER REGULATORY COMMISSIONS?

A. This is my first time to present testimony before the New Jersey Board of Public Utilities ("BPU"). I have previously testified in electric utility rate,

merger, resource planning and restructuring proceedings before state commissions in Arkansas, Georgia, Iowa, Illinois, Michigan, Texas and Wisconsin.

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. GDS was retained by Co-Steel to assist it in analyzing certain potential impacts of Public Service Electric and Gas Company's ("PSE&G") restructuring proposal upon Co-Steel's future power costs. The purpose of my testimony is to discuss Co-Steel's specific concerns regarding PSE&G's proposal to recovery potential stranded costs through its Securitization Transition Charge ("STC") and the Non-Utility Generator (NUG) component of its Societal Benefits Charge ("SBC").[1] Co-Steel's primary concerns are that these proposed stranded cost recovery charges should not apply to Co-Steel and, if allowed, would effectively prevent Co-Steel from obtaining competitively priced power supply for its Perth Amboy mill after its current service agreement with PSE&G expires in 2005.

Q. WHAT ARE POTENTIAL STRANDED COSTS?

A. Potential stranded costs represent the difference between the non-mitigable prudent regulated production costs incurred by a utility in meeting its obligation to serve a customer, and the forecasted

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1 For simplicity, I will hereafter refer to the STC and NUG component of the SBC as "stranded cost recovery charges".

deregulated market cost of providing that same service.

Q. HOW IS THE REMAINDER OF YOUR TESTIMONY ORGANIZED?

A. Section II provides a summary of my testimony. In Section III, I briefly discuss the history, terms and value of Co-Steel's 1995 Service Agreement with PSE&G ("the 1995 Agreement"). In Section IV, I outline the major effects of PSE&G's electric restructuring proposal upon service provided to Co-Steel both during and after the 1995 Agreement. In Section V, I discuss several reasons why PSE&G's proposed non-bypassable stranded cost recovery charges are unreasonable and should not apply to Co-Steel. In Section VI, I provide brief concluding comments which summarize Co-Steel's findings and recommendations on these issues.

II. SUMMARY OF TESTIMONY

Q. PLEASE SUMMARIZE YOUR TESTIMONY.

A. In the early 1990's, Co-Steel Raritan initiated negotiations with PSE&G in an effort to reduce its power costs for its Perth Amboy mill to a more competitive level. In late 1994, Co-Steel and PSE&G entered into a ten-year agreement whereby Co-Steel received certain rate discounts in exchange for its commitment to remain in New Jersey and to purchase all of its power requirements from PSE&G for ten years. The agreement was approved by the BPU, with certain modifications in November of 1995. The BPU and all parties to the stipulation supporting the 1995 Agreement concurred that the

terms and charges for service it provided were prudent and in the public interest.

Less than two years after approval of the 1995 Agreement, PSE&G filed an electric restructuring proposal with the BPU which would apply stranded cost recovery charges to Co-Steel of approximately $7.5 million per year[2] for the recovery of potential stranded costs. These non-bypassable charges would be applied to Co-Steel after the 1995 Agreement expires, to the extent Co-Steel remains a customer of PSE&G or remains at its current location but takes delivery of power from other sources.

PSE&G's proposed stranded cost recovery charges should not apply to Co-Steel for several reasons. First, the level of stranded costs assigned to any customer should be directly related to the utility's obligation and cost of serving that customer. The events leading up to the 1995 Agreement established that Co-Steel had real competitive alternatives, was not bound to continue purchasing power from PSE&G. Furthermore, since 1980, Co-Steel has taken service from PSE&G on an interruptible basis. The cost of providing such interruptible service is much lower than the cost of providing firm service and this difference is reflected in the rate credits which PSE&G provides for interruptible service. By agreeing to take its service on an interruptible basis, Co-Steel also has allowed PSE&G to reduce its overall investment in firm power resources and thus to reduce its potential stranded costs from the level that otherwise would have existed. PSE&G's proposed stranded cost recovery charges ignore

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[2] See Exhibit DSN-1.

these facts, and are based on the unrealistic assumption that Co-Steel is obligated and likely to take service from PSE&G on a firm basis after the 1995 Agreement expires in 2005 at rates equivalent to PSE&G's full embedded cost

In addition, the BPU Order approving the 1995 Agreement established that it was prudent and in the public interest for PSE&G to offer Co-Steel discounted rates. These discounted rates are largely based upon competitive market power prices and include additional discounts to reflect the interruptible nature of Co-Steel's service. Because stranded costs represent the difference between the regulated and competitive market charges for power to serve a given customer, and Co-Steel's regulated rates are essentially equal to competitive market rates, Co-Steel's share of PSE&G's potential stranded costs would be very small, if not non-existent. In summary, the non-bypassable stranded cost recovery charges that PSE&G proposes to apply to Co-Steel are based on the erroneous assumptions that Co-Steel is obligated and likely to purchase power from PSE&G during the remaining term of the 1995 Agreement and for another 30 years thereafter at PSE&G's full system average embedded production cost of service. These assumptions are simply wrong. Thus, PSE&G's proposed stranded cost recovery charges should not apply to Co-Steel after its 1995 Agreement expires, even in the hypothetical case that Co-Steel was obligated to continue to purchase power from PSE&G after 2005, which it is not.

Q. ARE THERE OTHER PROBLEMS WITH PSE&G'S PROPOSED STRANDED COST RECOVERY CHARGES?

A. Yes. PSE&G's proposed stranded cost recovery charges also would give rise to market inefficiencies and uncertainty that would likely worsen the climate for economic development in New Jersey and delay the formation of a fully competitive regional power market. This is because the STC charge has not yet been established, the costs recovered in these charges include avoidable costs, and because PSE&G proposes to adjust the level of these stranded cost recovery charges on an annual basis.[3] As such, PSE&G's proposed stranded cost recovery charges are inconsistent with the BPU's major goals for the electric restructuring process (i.e., economic development and formation of a competitive market).[4]

Q. WHAT ARE YOUR RECOMMENDATIONS?

A. I recommend that the BPU specifically find that PSE&G's proposed stranded cost recovery charges should not apply to Co-Steel after the 1995 Agreement expires in 2005. Without a clear finding by the BPU that PSE&G's proposed stranded cost recovery charges will not apply to Co-Steel, Co-Steel will have to once again consider alternatives to achieve a competitively-priced supply of power for its Perth Amboy mill.

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[3] See page 25, lines 3-7 of PSE&G witness Lark's direct testimony and page 2, lines 10-16 of PSE&G witness Schirra's direct testimony (Attachment D).

[4] See page 1 of the BPU's April 1997 report, Restructuring the Electric Power Industry in New Jersey ("the BPU's Electric Restructuring Report").

III. VALUE OF 1995 CO-STEEL AGREEMENT

Q. ARE YOU GENERALLY FAMILIAR WITH THE EVENTS WHICH LEAD TO THE SIGNING OF THE 1995 AGREEMENT BETWEEN CO-STEEL AND PSE&G?

A. Yes.

Q. WHAT ARE THE MAJOR PROVISIONS OF THE 1995 AGREEMENT?

A. The 1995 Agreement, which appears as an exhibit to Co-Steel witness Dimiceli's testimony, includes the following major provisions:

- Co-Steel agreed to purchase power exclusively from PSE&G over a ten-year contract term ending in 2005 at a discounted rate which exceeded the marginal cost to serve Co-Steel.
- Under the agreement, Co-Steel's peak demand above 6 MW is interruptible with 30 minutes notice for up to 150 hours per year.
- Co-Steel agreed to invest approximately $37 million to improve and expand the operations of its Perth Amboy mill.
- Co-Steel's rates from PSE&G during the ten-year agreement would be based on charges for two separate blocks of service. For approximately one third of Co-Steel's annual requirements (Block 1), Co-Steel pays PSE&G's standard High Tension Service (HTS) tariff with certain adjustments to the fuel clause portion of that tariff. All remaining power purchased by Co-Steel (Block 2), is priced under PSE&G's Experimental Hourly

Energy Pricing Service (EHEP) tariff. Charges under this tariff are based on PSE&G's marginal energy cost, plus certain other charges including a contribution to PSE&G's fixed costs. The agreement also provides for certain credits for the interruptible portion of Co-Steel's load.

Q. DOES THE 1995 AGREEMENT PROVIDE VALUE TO PARTIES OTHER THAN CO-STEEL?

A. Yes. The Agreement has provided and will continue to provide very substantial value to PSE&G, its customers and to the State of New Jersey. For example, the agreement ensures that Co-Steel's Perth Amboy mill remains in operations for ten years thus providing 470 jobs with related payroll of more than $28 million per year, local and state tax revenues of $2 million per year, and purchases of more than $50 million per year of New Jersey goods and services. In addition, the Agreement requires that Co-Steel pay a substantial portion of PSE&G's fixed costs that otherwise would have been borne by remaining customers had the Perth Amboy operations been relocated to another state.

Q. DID THE BPU RECOGNIZE THAT THE VALUE PROVIDED BY THE 1995 AGREEMENT MORE THAN OFFSET THE RATE DISCOUNTS PROVIDED TO CO-STEEL?

A. Yes it did. On pages 52 of its November 17, 1995 Order approving the Agreement, the BPU explicitly noted that the Agreement was "reasonable and

prudent throughout its term, and has been entered into pursuant to State policy and is in the public interest".

Q. WILL THE PERTH AMBOY FACILITY PROVIDE SIMILAR BENEFITS TO THE STATE OF NEW JERSEY AND ITS CITIZENS AFTER THE EXPIRATION OF THE 1995 AGREEMENT?

A. Yes. The Perth Amboy mill will continue to provide substantial benefits to the state and its citizens in the form of jobs, tax revenues and consumption of local goods and services.

IV. POTENTIAL IMPACT OF PSE&G PROPOSALS ON CO-STEEL

Q. HOW WOULD PSE&G'S RESTRUCTURING PROPOSAL AFFECT ITS SERVICE AND CHARGES TO CO-STEEL DURING THE REMAINING TERM OF THE 1995 AGREEMENT?

A. As explained in the testimony of Co-Steel witness Dimiceli, PSE&G has assured Co-Steel that its restructuring proposal will not increase Co-Steel's power costs over the levels that otherwise would have been incurred during the remaining term of the 1995 Agreement.

Q. HOW WOULD PSE&G'S RESTRUCTURING PROPOSAL AFFECT CO-STEEL AFTER THE 1995 AGREEMENT EXPIRES IN 2005?

A. After the 1995 agreement expires, PSE&G's proposal would apply certain non-bypassable stranded cost recovery charges to Co-Steel in the event Co-Steel continues to take delivery service from PSE&G or is supplied from another source of

power but remains at its current location. These stranded cost recovery charges include the STC and the NUG component of the SBC.[5]

Q. WOULD THESE PROPOSED STRANDED COST RECOVERY CHARGES AFFECT CO-STEEL'S ABILITY TO OBTAIN COMPETITIVELY PRICED ELECTRICITY FOR ITS PERTH AMBOY MILL AFTER THE 1995 AGREEMENT EXPIRES IN 2005?

A. Yes they certainly would. According to current information on these charges, PSE&G's proposed stranded cost recovery charges would increase Co-Steel's electricity costs by approximately $7.5 million per year over the prevailing market price.[6] These charges would *be in addition to* the costs that Co-Steel would incur for competitively priced power from suppliers serving the New Jersey market.

It seems likely that some of the factors that have historically made power costs in New Jersey higher than other regions (e.g., high labor costs, taxes, environmental regulations) will continue to influence future New Jersey market prices. Therefore, if PSE&G's proposed stranded cost recovery charges are added to the already relatively

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5 PSE&G representatives have indicated to Co-Steel that PSE&G does not propose to apply its Competitive Transition Charge (CTC) to Co-Steel service after the agreement expires in the event Co-Steel remained a distribution customer of PSE&G and chose to purchase its power requirements from another supplier. However, under such circumstances, PSE&G would still seek to collect the STC and NUG component of the SBC from Co-Steel through its proposed distribution delivery charge.

6 See Exhibit DSN-1.

high future New Jersey market prices, Co-Steel's Perth Amboy mill will likely have difficulties competing with mills located in regions with lower power costs, just as it did prior to negotiating the rate discounts provided in its 1995 Agreement.

Q. IF CO-STEEL HAD DECIDED IN 1995 TO RELOCATE ITS PERTH AMBOY MILL OPERATIONS TO ANOTHER STATE WOULD IT BE OBLIGATED TO PAY ANY AMOUNT FOR PSE&G'S POTENTIAL STRANDED COSTS?

A. No. Customers who relocate out of PSE&G's current service area are exempted from any stranded cost recovery charges under the Company's restructuring proposal. Furthermore, on page 97 of its Electric Restructuring Report, the BPU dismissed the issue of holding relocated customers responsible for stranded costs, observing that such relocations were not a new phenomenon and had historically been treated simply by reallocating cost responsibility to remaining customers.

V. REASONABLENESS AND APPLICABILITY OF PSE&G'S PROPOSED STRANDED COST RECOVERY CHARGES

Q. SHOULD THE STRANDED COST RECOVERY CHARGES PROPOSED BY PSE&G IN THIS CASE APPLY TO CO-STEEL AFTER THE 1995 AGREEMENT EXPIRES?

A. No. There are several reasons why PSE&G's proposed stranded cost recovery charges should not

apply to Co-Steel after the 1995 Agreement expires, including:

- The events leading to the 1995 Agreement established that Co-Steel has no obligation to pay for PSE&G's potential stranded costs or to take service from PSE&G after the agreement expires in 2005.
- PSE&G's proposed stranded cost recovery charges are based on the unrealistic assumptions that Co-Steel is obligated to remain a customer of PSE&G for another 30 years after the 1995 Agreement expires, and that both during and after the 1995 Agreement Co-Steel would be required to pay PSE&G's full embedded cost of service.
- PSE&G's proposed stranded cost recovery charges do not reflect the ongoing value to PSE&G of the interruptible service that has been provided to Co-Steel since 1980.
- The proposed charges would make it difficult for Co-Steel's Perth Amboy mill to compete with mills in other regions that have lower power costs, and thus could jeopardize the substantial economic benefits provided by the Perth Amboy mill to the State of New Jersey and its citizens.

Q. PLEASE EXPLAIN WHY YOU BELIEVE THAT THE EVENTS LEADING TO THE 1995 AGREEMENT ESTABLISHED THAT CO-STEEL HAS NO OBLIGATION TO TAKE SERVICE FROM PSE&G AFTER THAT AGREEMENT EXPIRES IN 2005 OR TO PAY FOR PSE&G'S POTENTIAL STRANDED COSTS?

A. The events leading to the 1995 Agreement established that, without substantial rate discounts, Co-Steel had strong economic incentives to relocate

its Perth Amboy operations to another state, and that by doing so it could bypass all future obligations for PSE&G stranded costs. At the time of the 1995 Agreement, PSE&G was fully aware that the Co-Steel load could be lost to retail competition or to relocation of the mill operations after the ten-year agreement. PSE&G also should have known that the competitive pressures which lead Co-Steel to seek the rate reductions provided under the 1995 agreement would not diminish in the future. Given these facts, PSE&G should have expected that it would have to provide similar market-based rate discounts in the future in order to be able to continue to serve Co-Steel's Perth Amboy mill after the 1995 Agreement expired.

The 1995 Agreement established charges for Co-Steel that are based in large part on competitive market indices. These discounted charges under the agreement were found by the BPU and all parties to the Stipulation supporting the agreement to be reasonable and prudent. Therefore, even if Co-Steel had a continuing future obligation to take service from PSE&G, which it does not, the level of potential stranded costs attributable to Co-Steel should not be based on the difference between market-based prices and PSE&G's full embedded production cost of service as proposed by the Company. Rather, the stranded costs attributable to Co-Steel under such a hypothetical case would be limited to the difference (if any) between market-based revenues and the largely market-based charges that the BPU has determined would be prudent for PSE&G-provided service to Co-Steel.

Q. PLEASE EXPLAIN WHY PSE&G'S PROPOSED STRANDED COST RECOVERY CHARGES ARE BASED ON ERRONEOUS ASSUMPTIONS REGARDING SERVICE TO

CO-STEEL AFTER ITS CURRENT AGREEMENT EXPIRES IN 2005.

A. PSE&G's proposed stranded cost recovery charges are designed to recover the potential stranded costs related to its nuclear generating facilities and NUG purchased power agreements. In simple terms, potential stranded costs are the forecasted difference between the regulated and competitive market cost of providing service to a customer. PSE&G's stranded cost analysis computes stranded costs as the difference between its full embedded cost of production service and market-based cost of that service over the period beginning in January of 1999 and extending through 2035.[7] Therefore, PSE&G's proposed stranded cost recovery charges overstate Co-Steels stranded cost obligation by reflecting its full embedded production costs rather that the market-based costs that underlie the discounted charges that the BPU determined should apply to Co-Steel during the term (1995-2005) of the 1995 Agreement. These costs should not be attributable to Co-Steel under any circumstance.

Q. PLEASE EXPLAIN WHY SUCH COSTS SHOULD NOT BE ATTRIBUTABLE TO CO-STEEL UNDER ANY CIRCUMSTANCE.

A. PSE&G's proposal to charge Co-Steel after the 1995 Agreement expires for potential stranded costs incurred during the term of the agreement is the economic equivalent of a surcharge of costs that were otherwise not recoverable under the agreement. As indicated by the testimony of Co-Steel witness Dimiceli, Co-Steel is of the opinion that these

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[7] See Schedule CJL-H2 of the direct testimony of PSE&G witness Colin Loxley.

charges are both inappropriate and in violation of the 1995 Agreement.

Q. PLEASE DISCUSS WHY PSE&G'S PROPOSED STRANDED COST RECOVERY CHARGES DO NOT APPROPRIATELY CAPTURE THE VALUE ATTRIBUTABLE TO THE INTERRUPTIBLE SERVICE PROVIDED TO CO-STEEL.

A. As previously noted, Co-Steel has taken interruptible service from PSE&G since 1980. This type of service has allowed PSE&G to reduce the level of its long-term investment in generating facilities and NUG purchased power contracts. However, PSE&G is proposing that its stranded cost recovery charges would be determined by dividing total stranded costs by total system kilowatt-hours and applying the resultant rate to future energy deliveries to existing customers such as Co-Steel.[8] Thus, the Company's proposed charges do not reflect the ongoing value of its ability to reduce long-term firm power investments, and thus its stranded costs, as a result of providing interruptible service to Co-Steel and other customers. In this way, the Company's proposed charges would result in an additional over-allocation of stranded cost responsibility to Co-Steel. However, I must reemphasize that it is Co-Steel's position that it has no obligation for PSE&G's potential stranded costs beyond the term of its current 1995 Agreement.

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8 See page 2, lines 4-10 (Attachment D) and page 28, lines 6-10 Attachment I) of PSE&G witness Schirra's direct testimony.

Q. PLEASE EXPLAIN WHY PSE&G'S PROPOSED STRANDED COST RECOVERY CHARGES WOULD PREVENT CO-STEEL FROM OBTAINING COMPETITIVELY-PRICED POWER AFTER ITS CURRENT AGREEMENT WITH PSE&G EXPIRES IN 2005?

A. Another reason why PSE&G's proposed charges should not apply to Co-Steel after 2005 is that such charges would prevent Co-Steel from obtaining a competitively-priced power supply for its Perth Amboy mill, thus creating the same financial pressures that lead Co-Steel to negotiate the rate discounts provided in the 1995 Agreement. The BPU and other parties have previously established that it is in the public interest to provide competitively price power for the Perth Amboy mill because of the substantial economic benefits the mill provides to the State of New Jersey and its citizens. PSE&G's proposal to apply non-bypassable stranded cost recovery charges to Co-Steel after the 1995 Agreement expires would prevent this, and therefore should be rejected.

Q. ARE THERE OTHER REASONS WHY PSE&G'S PROPOSED STRANDED COST RECOVERY CHARGES SHOULD NOT APPLY TO CO-STEEL AFTER ITS CURRENT AGREEMENT WITH PSE&G EXPIRES IN 2005?

A. Yes. There are two other major reasons why these charges should not apply to Co-Steel. First, the basic structure of these charges will lead to market inefficiencies and thus delay the anticipated savings that could be expected from the development of a fully competitive power market in New Jersey.

This is because a portion of the production costs which PSE&G proposes to recover in these charges consists of avoidable costs of producing power, including non-fuel operations and maintenance (O&M) expense and incremental capital additions.[9] By including these avoidable costs in its proposed stranded cost recovery charges, PSE&G would create an artificial advantage for its generating facilities in the competitive market which could in turn lead to an increase in the total cost of power that its customers will have to pay once power markets are fully deregulated.

Second, by proposing that its stranded cost recovery charges continue for some unspecified period of time beyond the end of its proposed seven-year transition period (2005), PSE&G's plan would unnecessarily delay the development of a fully competitive power market in New Jersey. This aspect of the Company's proposal conflicts directly with the BPU's recommendation on page 11 of its Electric Restructuring Report that the applicability of such transition charges be limited to a period of 4 to 8 years. As long as stranded cost recovery charges exist and are subject to adjustment on some periodic basis, as is proposed by the Company, it will be very difficult for large consumers such as Co-Steel and potential competing power suppliers to predict future power prices with a sufficient level of certainty to support major investment or power supply decisions.

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[9] See Schedule CJL-H2 of the direct testimony of PSE&G witness Colin Loxley.

VI. CONCLUSION

Q. PLEASE SUMMARIZE YOUR CONCLUSIONS AND RECOMMENDATIONS.

A. By entering into its 1995 Agreement with PSE&G, Co-Steel made a substantial long-term financial commitment to the state of New Jersey and its citizens. While Co-Steel has benefitted from the rate discounts provided under the agreement, the BPU and all parties to the stipulation that supported the agreement recognized that retaining Co-Steel as a customer of PSE&G provided substantial offsetting economic benefits to the State and was therefore in the public interest. Virtually all of the benefits of retaining Co-Steel's Perth Amboy mill operations in New Jersey will exist after the 1995 agreement expires. However, the level of benefits provided by the Perth Amboy mill in the future will be dependent on whether Co-Steel is able to maintain a competitively-priced supply of power for the facility. It would be short-sighted, contrary to the public interest, and in direct conflict with the BPU's and the State of New Jersey's expressed commitment to support economic development and the development of a competitive power market in New Jersey to allow PSE&G to apply its proposed non-bypassable stranded cost recovery charges to Co-Steel after its current agreement expires in 2005.

For the reasons set forth in my testimony, the stranded cost recovery charges proposed by PSE&G should not apply to Co-Steel after its current agreement expires in 2005, and are contrary to the electric restructuring goals established by the BPU. Furthermore, even if the BPU should decide that PSE&G's proposed stranded cost recovery charges should apply to Co-Steel, the level of the stranded

costs that PSE&G proposes to allocate to Co-Steel are excessive, given that there should be little if any difference between competitive market charges and the largely market-based regulated rates that the BPU has recognized should apply to Co-Steel.

For all of the reasons discussed above, I recommend that the BPU find that PSE&G's proposed stranded cost recovery charges should not apply to Co-Steel after its current agreement with PSE&G expires in 2005.

Q. DOES THAT CONCLUDE YOUR TESTIMONY?

A. Yes, it does.

EXHIBIT DSN-1

ESTIMATED ANNUAL IMPACT OF PSE&G STRANDED COST RECOVERY CHARGES ON CO-STEEL RARTIAN AFTER 2005

NUG Component of SBC Charge, cents/kWh[10]	0.76698
Times Estimated Co-Steel Annual kWh Sales	440,000,000
Equals Annual NUG Charge	$3.374.712
Plus Co-Steel's Estimated Share of STC Costs[11]	$4,114,180
Equals Total Estimated Charge to Co-Steel	$7,488,892

[10] Source is page 1 of Shirra's Schedule GWS-1-9

[11] Equals total annual PSE&G securitization costs of $411.418 million per PSE&G witness Krueger's Schedule RCK-E3, times one percent, which is the Co-Steel's estimated share of total PSE&G sales.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

IN THE MATTER OF PUBLIC	)	BPU Docket No.
SERVICE ELECTRIC AND	)	EO97070461
GAS COMPANY	)	OAL Docket No.
UNBUNDLED RATES FILING	)	PUC 7348-97
	)	
IN THE MATTER OF PUBLIC	)	BPU Docket No.
SERVICE ELECTRIC AND	)	EO97070462
GAS COMPANY STRANDED	)	OAL Docket No.
COSTS FILING	)	PUC 7347-97

SUR-REBUTTAL TESTIMONY
OF
VINCENT C. DIMICELI
ON BEHALF OF
CO-STEEL RARITAN

JANUARY 26, 1998

Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS?

A. My name is Vincent C. Dimiceli. My business address is c/o Co-Steel Raritan, 225 Elm Street, P.O. Box 309, Perth Amboy, NJ 08862.

Q. BY WHOM AND IN WHAT CAPACITY ARE YOU CURRENTLY EMPLOYED?

A. I am Controller of Co-Steel Raritan ("Co-Steel"), which operates a steel recycling and manufacturing plant in Perth Amboy. I have held this position since 1990, the year I began working for Co-Steel.

Q. PLEASE DESCRIBE YOUR PREVIOUS EMPLOYMENT AND EDUCATIONAL BACKGROUND?

A. Before joining Co-Steel, I was employed for several years each as controller at Synfax, at Olin Runt Specialty Chemicals, and at Interpace Corporation. Interface is a manufacturer of wire products. Overall, I have worked in the steel industry for 16 years. My educational background is in the field of accounting.

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY IN THIS PROCEEDING?

A. The purpose of my testimony is to describe some of the circumstances under which Co-Steel entered into its current power supply contract with PSE&G in late 1994. This testimony is in support of Co-Steel's position that it is inconsistent with the current Co-Steel contract to require Co-Steel at the

end of the contract term to pay certain stranded cost-related charges reflected in PSE&G's proposal.

Q. PLEASE DESCRIBE MORE SPECEICALLY THE CHARGES TO WHICH YOU REFER?

A. I understand that the relevant portions of PSE&G's proposal are not entirely clear, and that the charges in question could be imposed on Co-Steel in various different forms, depending on the circumstances.

PSE&G witness Gerald Schirra proposes a Competition Transition Charge (Schedule GWS-D2) ("CTC"), under which customers of PSE&G who switch electric suppliers during or after the transition period would continue to have to pay PSE&G certain stranded cost-related charges, including a securitization charge ("STC") and a non-utility generator charge ("NUG"). It was unclear to Co-Steel whether the CTC as proposed by PSE&G applied only if a customer switched to self-generation and PSE&G did not deliver the alternative energy supply, or whether it applied any time PSE&G was replaced by a different power supplier (such as another utility), even if PSE&G still provided delivery service. We now understand, based on recent conversations between Co-Steel's counsel and PSE&G's counsel, that the CTC is intended to apply to a PSE&G departing customer only if PSE&G is not involved in the deliveries. If PSE&G must deliver the replacement power, the CTC would not apply, and it probably will not apply to Co-Steel since Co-Steel is not a candidate for self-generation and any alternate power supply is likely to require PSE&G delivery. In that case, however, we were told by PSE&G that the same stranded cost-related charges contained in the CTC (i.e., STC and NUG charges) would be passed

through to Co-Steel in the distribution delivery charge.

According to PSE&G witness Frederick W. Lark, at page 6 of his direct testimony, that charge will not be set until the last year of the proposed transition period.

Co-Steel's position simply is that it is inconsistent with the current Co-Steel contract to require Co-Steel, at the end of the current contract term, to pay these stranded cost-related STC and NUG charges regardless of whether or not Co-Steel switches electric suppliers at that time, and regardless of whether PSE&G collects the charges through the CTC, through a distribution delivery charge, or through some other feature in its rates.

Q. DOES CO-STEEL ALSO BELIEVE IT IS INCONSISTENT WITH THE CURRENT CO-STEEL CONTRACT FOR PSE&G TO REQUIRE CO-STEEL TO PAY STC, NUG OR OTHER STRANDED COST-RELATED CHARGES TO PSE&G *DURING* THE CURRENT CONTRACT TERM?

A. In principle, that is our position. However, we have been assured by PSE&G that, even if such charges are imposed on Co-Steel during the contract term, they would not increase Co-Steel's electric costs over what they otherwise would be during the contract because such charges would be offset by rate reductions resulting from this proceeding and that, overall, Co-Steel could expect its electric costs under the contract to decrease along with those of other ratepayer classes. Therefore, since the overall result is not expected to harm Co-Steel during the contract term, Co-Steel is not directly opposing that aspect of PSE&G's proposal in this proceeding. I am advised by our counsel, however, that legally

the imposition of any such stranded cost-related charges during the term of the Co-Steel contract is inconsistent with and violates the contract. Co-Steel, by refraining Tom litigating that issue at this time, does not intend to waive any of its arguments or its rights under the contract.

Q. PLEASE BRIEFLY DESCRIBE CO-STEEL'S OPERATIONS AT THE PERTH AMBOY PLANT?

A. The Perth Amboy plant, which is classified in the steel industry as a "minimill," produces industrial and special quality grades of wire rod for use in a wide variety of applications, such as fencing, nails, hangers, welding rod, springs, wire, cable, and fasteners. Wire rod is sold in highly competitive commodity markets, wherein customer choices are driven by price and availability of product meeting industry grade standards. Costs and productivity advantages in the factory thus directly translate into competitive advantages in the marketplace.

The principal raw material used in the Perth Amboy minimill is scrap steel derived from sources that include junked automobiles and appliances. Electric energy is used to melt, refine. and shape scrap to produce the plant's output, thereby converting some 850,000 tons of scrap and pig iron into useful products annually. Scrap and electricity account for two of the three most significant operating costs incurred by Co-Steel at Perth Amboy, the other being labor. Co-Steel currently employs more than 470 people at the Perth Amboy minimill, representing a direct payroll of some $28 million and associated fringe benefits and payroll taxes approaching $l 1 million per year. In addition, Co-Steel annually pays local and State

taxes on the order of $2 million and buys more than $50 million worth of goods and services from New Jersey vendors (exclusive of electricity).

Q. PLEASE DESCRIBE CO-STEEL'S ELECTRIC CONSUMPTION?

A. Co-Steel currently takes electric service from PSE&G at the Perth Amboy plant at 230,000 volts. Co-Steel's load peaks at almost 100 megawatts and its annual energy consumption exceeds 440,000,000 kwh. Power supplied to the Perth Amboy minimill above a 6 megawatt firm load is interruptible by PSE&G for up to 150 hours annually. Co-Steel's annual electric bill paid to PSE&G exceeds $18 million.

Q. DESCRIBE THE TERMS UNDER WHICH CO-STEEL CURRENTLY TAKES ELECTRIC SERVICE FROM PSE&G?

A. PSE&G currently supplies power to Co-Steel under its Experimental Hourly Energy Pricing Service (EHEP) tariff and a related November 14, 1994 service agreement (the "Co-Steel Contract"). The tariff and service agreement, as amended, were approved by the New Jersey Board of Public Utilities by Order of November 17, 1995, in Docket No. ER95010005, with the new rate effective retroactive to April 1, 1995. A copy of the Co-Steel Contract as approved by the Board is attached hereto as Exhibit VCD-1. The Exhibit in its entirety consists of (1) a July 24, 1995 Stipulation among PSE&G, Co-Steel, the Patepayer Advocate, and the Staff of the Board, (2) PSE&G's current EHEP tariff (Attachment A), (3) the November 14, 1994 Contract between Co-Steel and PSE&G (including a February 28, 1995 letter from PSE&G to counsel for Co-Steel modifying the Contract) (Attachment B), (4) the LEAC Accounting methodology

(Attachment C), (5) a Memorandum of Understanding among New Jersey Department of the Treasury, PSE&G and Co-Steel (with Co-Steel's June 28, 1995 letter to Treasury attached) (Attachment D), and (6) an August 17, 1995 Addendum to the Stipulation.

Q. PLEASE DESCRIBE THE CIRCUMSTANCES THAT LED TO THE CO-STEEL CONTRACT?

A. Prior to entering into the Co-Steel Contract, Co-Steel paid PSE&G tariff rates that placed Co-Steel at a significant production disadvantage compared to its major competitors. Co-Steel competes primarily with a number of wire rod minimills located in the Southern and Midwestern regions of the country. The steel industry in which Co-Steel operates is highly competitive, and it was crucial to Co-Steel, and continues to be so today, that Co-Steel receive the lowest possible electric rate in order for it to be able to compete effectively in its industry. In 1994, Co-Steel spent more than $24 million for electric service from PSE&G, and the cost was expected to escalate to $26 million in 1995.

During 1993 and 1994, Co-Steel attempted to persuade PSE&G to accept power supply rate reductions as a means for retaining the Perth Amboy plant as a customer, pointing out that significantly lower rates were available to Co-Steel's principal competitors and that PSE&G's rates were deterring investment at Perth Amboy and would ultimately lead to closure of the mill.

In 1992, Co-Steel's parent company (in partnership with another steel maker) had engaged in intensive site-selection activities relating to a "greenfield" sheet steel mill project in the Midwest.

In the course of such activities, prospective power suppliers proposed rates for electric service to the project at levels on the order of one-half of PSE&G's then most advantageous tariff rates. Around April 1993, the partners announced that they had selected a site in Gallatin County, Kentucky, based on power supply costs and other factors. Construction of that facility was completed in 1995 and the plant is now operating. The decision of Co-Steel's parent to site a plant in Kentucky caused Co-Steel to begin considering alternatives to the Perth Amboy minimill for wire rod production. Co-Steel invited PSE&G to develop means for reducing power supply costs at Perth Amboy, such that production there could be economically continued and expanded.

In mid-1993, Co-Steel undertook to investigate the financial feasibility of replacing Co-Steel's Perth Amboy facility with a new rod mill to be constructed in the State of Kentucky. Because of the efforts of Co-Steel's parent company in locating a mill in Kentucky, Co-Steel knew of certain sites in the State that were suitable for use by Co-Steel and available for purchase. Kentucky was well situated in relation to the facility's scrap supply needs, as well as existing rod markets. Co-Steel further determined that a Kentucky facility offered a substantial operating benefit in comparison to the Perth Amboy facility by reason of Kentucky's substantially lower energy and labor costs, as well as tax and other economic incentives available from the State of Kentucky. Regarding energy costs, Co-Steel found that Kentucky Utilities Company could offer an electric price under its tariff of around 2.5d/kwh, compared to the 5.35d/kwh price then being paid by the Perth Amboy facility. This differential could yield annual savings for energy alone in excess of $12 million. Co-Steel concluded

that a more detailed analysis of the economic feasibility of building a rod mill in Kentucky was justified.

In mid-1993, Co-Steel's negotiations with PSE&G over a possible rate reduction reached an impasse. Negotiations became more active again in the summer and fall of 1994, and ultimately resulted in the November 14, 1994 Co-Steel Contract.

Q. DID YOU PARTICIPATE IN THE NEGOTIATIONS LEADING TO THE CO-STEEL CONTRACT?

A. Yes. Negotiations of the current Co-Steel Contract took place mostly in the second half of 1994 and were conducted for Co-Steel primarily by Ed Calanog, who at the time was Co-Steel's president, and me. Mr. Calanog left the company in early 1995. At the time of the negotiations I reported to Mr. Calanog and worked closely with him throughout the negotiations. I attended some of the meetings Co-Steel had with PSE&G, generally worked closely with Mr. Calanog on all aspects of the negotiations, and participated in the deliberations that took place within Co-Steel relating to the negotiations. I also reviewed the various contract drafts we received from PSE&G during the negotiations, as well as the various calculations and spreadsheets that were supplied to us by PSE&G regarding the projected cost impact on Co-Steel of certain PSE&G offers.

Q. EARLIER YOU INDICATED THAT, E CO-STEEL SWITCHED POWER SUPPLIER AT THE END OF THE CURRENT CONTRACT AND THE CTC DID NOT APPLY TO CO-STEEL, PSE&G WOULD SEEK TO IMPOSE

THE STC AND NUG CHARGES THROUGH ITS DISTRIBUTION DELIVERY CHARGE. WHAT IS YOUR UNDERSTANDING OF THE TOTAL AMOUNT OF THE STC AND NUG CHARGES THAT CO-STEEL POTENTIALLY WOULD HAVE TO PAY PSE&G IN THAT CIRCUMSTANCE?

A. I understand that, as proposed by PSE&G, the total STC and NUG charges applicable to Co-Steel's current electric consumption could exceed $5 million per year, and that the charges could continue at that or some other similarly high level for five to ten years after our contract ends, or even longer.

Q. IN THE COURSE OF CO-STEEL'S NEGOTIATIONS WITH PSE&G LEADING TO THE NEW CO-STEEL CONTRACT, DID ANY DISCUSSION TAKE PLACE REGARDING POSSIBLE ONGOING PAYMENT OBLIGATIONS BY CO-STEEL IN THE EVENT IT REPLACED PSE&G WITH ANOTHER SUPPLIER AT THE END OF THE CURRENT CONTRACT?

A. No. I do not believe there was ever any mention by PSE&G of continuing charges following the end of the contract if Co-Steel switched suppliers. The context of the negotiations was that, as I already stated, Co-Steel had the opportunity to replace the Perth Amboy facility with a new plant in the Midwest, and that PSE&G wanted to keep Co-Steel in New Jersey and keep Co-Steel as a long-term customer. The parties therefore agreed that Co-Steel would receive a lower electric rate and that Co-Steel would remain a PSE&G customer for the ten year term of the contract. The contract does not

provide for any continuing obligation on the part of Co-Steel beyond that term, for stranded costs or anything else, and it does not provide for any charge or penalty to be imposed on Co-Steel if it switches suppliers at the end of the term. To my knowledge PSE&G never requested that any such continuing payment obligation be included in the contract, and the subject of stranded costs never was raised by PSE&G during the negotiations.

Q. AT THE TIME OF THE NEGOTIATIONS, TO WHAT EXTENT, IF AT ALL, WERE YOU AWARE OF THE POSSIBILITY THAT THE ELECTRIC INDUSTRY IN NEW JERSEY MIGHT BECOME DEREGULATED AND OPEN TO COMPETITION AT THE RETAIL LEVEL AND THAT CO-STEEL MIGHT HAVE THE OPTION AT THE END OF THE CONTRACT TERM TO PURCHASE ELECTRICITY FROM A DIFFERENT SUPPLIER?

A. In the fall of 1994, I believe I was very generally aware that electric industry deregulation was somewhere on the horizon and that it might occur to one degree or another in the succeeding few years. I had no idea how quickly it would occur, if it did, but I believed that if there was to be competition, there was a good chance it would arrive sometime during the ten-year term of our contract. We at Co-Steel believed, therefore, that there was a good possibility that by the end of the contract term, we would be allowed to select our electric supplier. The contract thus involved a trade-off, in that we would lock into a favorable electric rate for ten years, but in exchange we would be going up the opportunity to participate in any competitive market

for electricity that might develop before the end of our contract term.

Q. DID CO-STEEL MAKE ANY FORM OF COMMITMENT TO PSE&G THAT IT WOULD CONTINUE TO SECURE ITS ELECTRIC SUPPLY FROM PSE&G ONCE RETAIL COMPETITION ARRIVED IN NEW JERSEY?

A. No. Nor did PSE&G ask us for such a commitment beyond the ten-year term of the current contract.

Q. ASSUME THAT, AS PROPOSED BY PSE&G, CO-STEEL WOULD BE REQUIRED TO CONTINUE TO MAKE STC AND NUG PAYMENTS TO PSE&G FOR SEVERAL YEARS AFTER THE CURRENT CONTRACT TERMINATES IN THE EVENT CO-STEEL SWITCHES ELECTRIC SUPPLIERS. WOULD CO-STEEL HAVE ENTERED INTO THE CONTRACT HAD IT BELIEVED PSE&G WOULD BE ABLE TO COLLECT SUCH CHARGES AFTER THE CONTRACT TERMINATES?

A. Absolutely not. What Co-Steel bargained for, and what Co-Steel believed it was receiving, was a ten-year contract that reduced the price of electricity from PSE&G from an average of 5 .9 cents per kwh to an average of around 4.2 cents per kwh. For that reduction, Co-Steel gave up the opportunity to take advantage of any competitive market that developed during that period, but it retained the right to take advantage of open competition after the contract expired. It also agreed to invest an additional $37 million in capital in the Perth Amboy plant. Had

we been told before the contract was signed that PSE&G would have the right to impose a Fischer surcharge after the end of the contract term, Co-Steel would not have entered into that contract. Receiving the price we negotiated was crucial to Co-Steel and to its ability to compete in the highly competitive steel industry. The terms of the value of the contract to Co-Steel, the imposition of a

substantial stranded cost surcharge *after* the contract term is the equivalent of an increase in the contract price during the contract term. We did not bargain for that. We bargained for a price of around 4.2 cents per kWh during the contract term with no further surcharges from PSE&G either dazing or after the contract term (with the limited exception of certain new taxes, assessments or other charges that PSE&G itself might have to pay and that it passes through to Co-Steel).

Q. WHAT WOULD CO-STEEL HAVE DONE HAD IT BEEN TOLD BEFORE SIGNING THE CONTRACT THAT SURCHARGES OF THE TYPE WE DISCUSSED MIGHT APPLY AFTER THE CONTRACT TERM?

A. I cannot say for certain what Co-Steel would have done instead of entering into the contract, but we had several options. Among these were to further negotiate with PSE&G to secure a better contract, one with a value equivalent to what we thought we were getting absent any surcharges. Failing that, Co-Steel might have proceeded with the option to construct a new facility in the Midwest and ultimately terminate its operations at Perth Amboy. Instead we might have chosen not to sign any contract and planned on - taking full advantage of the competitive market for electricity as soon as it developed. I feel confident in saying, however, that

we would not have signed the current contract in its present form.

Q. I NOTE THAT THE CO-STEEL CONTRACT, B" SECTION 1, REQUIRES CO-STEEL TO INVEST AT LEAST $37 MILLION IN CAPITAL FOR REPLACEMENT, REFURNISHMENT, UPGRADING AND EXPANSION OF THE PERTH AMBOY PLANT AND CERTAIN RELATED OPERATIONS, WITH THIS INVESTMENT TO BE MADE UHTHIN 48 MONTHS FOLLOWING THE EFFECTIVE DATE OF THE AGREEMENT OR, IF LATER, WITHIN 48 MONTHS FOLLOWING RECEIPT OF THE NECESSARY ENVIRONMENTAL PERMITS. HAS CO-STEEL FULFILLED THIS OBLIGATION?

A. Yes. Since the contract was approved by the BPU in November 1995, Co-Steel has invested not just the required $37 million, but a total of $40 million mostly in capital for the purposes specified in Section 1 of the contract. We expect to invest another $20 million in capital during 1998. The capital improvements consist of upgrading the melt shop's electric furnace, continuous caster and home system, upgrading parts of the rolling mill, making certain general site improvements, and replacing certain plant equipment. I believe that Co-Steel has fully lived up to this part of its contract with PSE&G. I also find it very disturbing that, after Co-Steel has carried out *its* part of the bargain, in keeping the plant open, making a large additional investment of capital, and thereby keeping 470 very good, well-paying jobs in the area, PSE&G proposes to alter the terms we agreed to by seeking to impose added charges alder our contract terminates, when we thought we would be flee to

take full advantage of any competitive electric market that developed by then.

Q. WOULD CO-STEEL HAVE MADE THIS CAPITAL DIVESTMENT HAD THE NEW CO-STEEL CONTRACT NOT BEEN ENTERED INTO?

A. No. The need for capital improvements was a big part of the impetus in 1993 and 1994 to push to achieve the lower electric rate reflected in the current contract. Absent a substantial rate reduction, it would have been very difficult for Co-Steel to justify making such capital improvements to the Perth Amboy plant; the investments could have been more economically made elsewhere, with operations at the Perth Amboy plant ultimately being discontinued.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes.

EXHIBIT VCD-1

REDACTED COPY

STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

IN THE MATTER OF THE PETITION OF PUBLIC SERVICE AND GAS CO. FOR APPROVAL OF ITS PROPOSED EXPERIMENTAL HOURLY ENERGY PRICING TARIFF	) STIPULATION))) BPU DKT NO.) ER95010005)
AND	)
IN THE MATTER OF A JOINT PETITION OF PUBLIC SERVICE ELECTRIC AND GAS COMPANY AND CO-STEEL RARITAN FOR APPROVAL OF (1) THE SERVICE AGREEMENT AND (2) A PROTECTIVE ORDER FOR CONFIDENTIAL INFORMATION	)

On January 6. 1995, Public Service Electric and Gas Company (Public Service. the Company, or PSE&G), petitioned the Board of Public Utilities (Board) for approval of a new service offering for its proposed Experimental Hourly Energy Pricing Tariff (Attachment A), under which customers within its service territory who take interruptible electric service for at least two-thirds of their load from the Company at transmission voltages and have a minimum demand level of 40 MW may execute an Experimental Hourly Energy Pricing Service Agreement for Board approval.

On January 6, 1995. Public Service and Co-Steel Raritan (Raritan) also filed an Experimental Hourly Pricing Service Agreement, dated November 14, 1994 (the Service Agreement. or Agreement) (Attachment B) under the above-referenced tariff for Board approval.

The petitioners received and responded to extensive discovery, and the undersigned conducted several conferences to review the proposed tariff and Service Agreement.

On April 11, 1995, the Board conducted a public hearing, after notice, at which representatives of the petitioners, the Board's State the Division of Ratepayer Advocate (Advocate) and the public were afforded an opportunity to be heard with regard to this matter. Pursuant to the notice, an opportunity was provided to submit written comments, which period was extended at the April I l, 1995 public hearing, and again following the public hearing.

At its Agenda Meetings held on May 17, 1995 and June 14, 1995, the Board respectively approved participant status for New Jersey Citizen Action (NJCA) and the Independent Energy Producers of New Jersey (NJIEP) in response to NJCA's and NJIEP's motions to intervene received by the Board on May 4, 1995 and May 26, 1995, respectively.

Comments were accordingly filed by the Company, Co-Steel Raritan, Staff the Advocate, NJCA. NJIEP, and members of the public.

On July 20, 1995, Public Service and Co-Steel Raritan entered into a Memorandum of Understanding with the New Jersey Department of the Treasury (Attachment D) relating to taxation applicable to purchases of electricity under the Service Agreement.

The undersigned having reviewed the filing, discovery, and the comments. HEREBY AGREE AS FOLLOWS:

1. The Company's proposed Experimental Hourly Energy Pricing Tariff service offering as described in detail in Attachment A which reflects modifications agreed to by

the Parties, should be approved by the Board and become effective upon the Board's written approval of this Stipulation.

2. The Service Agreement between Co-Steel Raritan and Public Service, which is annexed hereto as Attachment B, should be approved by the Board as modified in accordance with the provisions of this Stipulation, such approval to be effective upon the Board's written approval of this Stipulation.

3. Clauses (i) and (iv) of Section 4 ("Conditions Precedent") on page 6 of the Service Agreement shall be replaced, respectively, by the following:

"(i) reasonable and prudent; provided, however, that other than as set forth in clause (iv) below, this finding is not determinative of future rate recovery, if any, from PSE&G's other ratepayers of the revenue loss occurring as a result of this Agreement (the reduction in revenue, including revenue received pursuant to PSE&G's Levelized Energy Adjustment Clause (LEAC), as compared to the revenue that would have been received if Raritan had remained on PSE&G's Rate Schedule HTS) should PSE&G seek such future recovery.

* * * * *

"(iv) in accordance with the Board's policy of maintaining revenue neutrality to other ratepayers. i.e., that PSE&G's LEAC charges to other ratepayers be unaffected by the Service Agreement, until the issue of the appropriate prospective recovery of any portion of the revenue loss described in clause (i) above is decided in PSE&G's next base rate case. and in recognition of the fact that absent a change in the accounting employed with PSE&G's LEAC, the LEAC revenue loss and the loss in base revenue for energy costs that results from not billing Co-Steel Raritan the LEAC base cost per kWh included in Rate Schedule HTS base rates would ultimately be recovered from PSE&G's other ratepayers, it is agreed that for purposes of determining PSE&G's LEAC

charges and associated accounting during the period prior to PSE&G's next base rate case:

(a) costs subject to recovery by the LEAC (including DSM costs) shall in total be credited monthly by an amount determined by multiplying that month's kWh sales to Raritan by the sum of the base cost employed in determining PSE&G's LEAC charges (currently 3.5 cents per kWh) and the then-applicable LEAC rate that would have been applied to such sales if Raritan had remained on PSE&G's Rate Schedule HTS, and

(b) other than the accounting change described in (a) above, no other changes in the method of determining PSE&G's LEAC charges (including DSM charges) are needed or shall be made."

A brief description of the accounting change and illustrative accounting entries to be employed in implementing this clause is attached as Attachment C

4. In addition to the monthly credits determined in accordance with clause (iv) (a) of Section 4 of the Service Agreement described above, PSE&G will calculate the equivalent credits that would have been determined if the component of the credit for current energy cost recovery were based on the marginal energy cost per kWh billed Co-Steel Raritan in that month rather than PSE&G's system average energy cost per kWh on which the then-applicable LEAC is based. As an annual reporting requirement, both calculations of the monthly credit will be provided to the Advocate and Board Staff for each month Co-Steel Raritan is billed under the Service Agreement until this reporting requirement is discontinued by further Order of the Board.

5. This Stipulation is signed without prejudice to the right of any party, in any of the Company's future base rate cases initiated during the life of the Service Agreement, to argue that the accounting treatment described in Paragraph 3 above, namely basing the energy cost

component of the monthly accounting credits to LEAC recoverable costs on PSE&G's average system energy cost per kWh rather than the marginal energy cost per kWh billed Co-Steel Raritan, provides a vehicle for fixed cost recovery by the Company. The Company hereby reserves its right to oppose that argument.

6. (a) On page 3 of the Service Agreement, in Section I (relating to Raritan Investment), the amount "50.0041" shall be changed to read "50.002805".

(b) On page 5 ofthe Service Agreement, in clause (iii) of Section 2 (relating to the Gross Receipts and Franchise Unit Tax for Block 2 energy), the amount "0.4 cents" shall be changed to read "0.5295 cents".

(c) On page 5 of the Service Agreement, clause (v) of Section 2 (relating to the fixed cost contribution for Block 2 energy) shall be deleted and the following two clauses shall be inserted in lieu thereof

"(v) A fixed cost contribution of _____ cents per kWh (all hours of the day); and

"(vi) The DSM Recovery factor applicable to FITS transmission service."

(d) On page 5 of the Service Agreement, in the last paragraph of Section 2 (relating to price), the amount "29,620 kW' shall be changed to read "29,260 kW' each of the three times it appears.

(e) On page 6 of the Service Agreement. in clause (iii) of Section 4 (relating to conditions precedent), the Gross Receipts and Franchise Unit Tax rate of"5.004" shall be changed to "50.005295".

(f) On page 16 of the Service Agreement, in Section 18 (relating to notices), the words "Ed M. Calanog, Ph.D.,

President" shall be changed to read "W. J. Shields, Chairman and Chief Executive Officer".

7. During the 24th month following the date the Service Agreement becomes effective. Co-Steel Raritan shall report in writing to the Advocate and the Board Staff on the status of Co-Steel Raritan's efforts to secure the permits necessary to investing the 537 million in capital referred to in Section 1 of the Service Agreement, the expected date of completion of such permitting efforts (if not yet complete), and the expected date of completion of the capital improvements to be made with such 537 million.

8. The Company and Co-Steel Raritan expressly agree that the modifications of the Service Agreement reflected in Paragraphs 3 and 6 of this Stipulation are acceptable to them. that such modifications shall not entitle either such party to void or otherwise reject the Service Agreement subsequent to the Board's approval of this Stipulation, and that no other provision of this Stipulation constitutes or shall be deemed a "modification" or "condition" within the meaning of Section 4 of the Service Agreement.

This Stipulation has been entered into solely for the purposes of this proceeding and shall not be binding upon the parties in other proceedings or in other forums or jurisdictions. except to enforce its terms. Except as expressly provided for herein. neither the Company. the Board. its Staff. the Division of the Ratepayer Advocate, nor Co-Steel Raritan shall be deemed to have approved, agreed to. or consented to any principle or methodology underlying any agreement provided herein. The contents of this Stipulation, in total or by specific items, by inference, inclusion or deletion. shall not in any way be considered, cited, or used by any of the undersigned as an indication of any party's position on any related or other issue litigated or considered in any other proceeding or forum.

The parties agree that this Stipulation was negotiated and agreed to in its entirety with each section's being mutually dependent on approval of all others. Therefore, if the Board modifies any of the terms of this Stipulation, each party is given the option to accept the change or to participate in the proceeding as if no Stipulation had been reached. If any panty refuses to accept the change, this Stipulation shall be null and void.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY

By: /s/_____
Roger L. Camacho, Esq.

CO-STEEL RARITAN

By:/s/_____
Foster De Reitzes, Esq.

DIVISION OF THE RATEPAYER ADVOCATE
BLOSSOM A. PERETZ, DIRECTOR

By:
/s/_____
Kurt S. Lewandowski
Asst. Deputy Public Advocate

DEBORAH T. PORITZ
ATTORNEY GENERAL OF NEW JERSEY
Attorney for the Staff of the Board of Public Utilities

By: /s/_____
Sarah H. Steindel
Deputy Attorney General

DATED: July 24, 1995.

ATTACHMENT A

PUBLIC SERVICE ELECTRIC AND GAS COMPANY

B.P.U.N.J. No. 12 ELECTRIC Original Sheet No. 85

EXPERIMENTAL HOURLY ENERGY PRICING SERVICE

(EHEP)

APPLICABLE TO:

Customers who take electric service at transmission level voltages with metered demands which exceed 40 megawatts and who can reduce at least two-thirds of their load to firm demand level specified in the Application for Interruptible Electric Service.

CHARACTER OF SERVICE:

Continuous for firm load. Balance is interruptible upon 30 minutes notice.

CONDITIONS OF SERVICE:

Customer must commit to a one time expenditure of at least 1.5 times its electric bill for the 12 months preceding the filing of a request for Board of Public utilities approval, as described below, in capital for replacement, refurbishment upgrading and expansion. Such expenditure shall be completed within 48 months of receipt of the environmental permit necessary for such construction.

Service under this rate schedule is available on an individual contract basis, subject to Board of Public Utilities approval. Under EHEP, the customer's cost of energy will vary hourly with changes in Public

Service's marginal energy cost. All other terms of the service are described by the contract.

Public Service Electric and Gas Company shall be the sole source of electric power for the customer's requirements served under this rate schedule over the duration of the contract.

Date of issue Effective:
issued by THOMAS M. CRIMMINS. JR..
Senior Vice President - Customer Operations
80 Park Plaza Newark, New Jersey 07101
Filed pursuant to Order of Board of Public Utilities,
dated in Docket No.

REDACTED COPY

CONFIDENTIAL

ATTACHMENT B

AGREEMENT BETWEEN CO-STEEL RARITAN AND PUBLIC SERVICE ELECTRIC AND GAS COMPANY

THIS AGREEMENT (hereinafter referred to as the "Agreement") is entered into this 14th day of November, 1994, by and between Public Service Electric and Gas Company ("PSESG") and Co-Steel Raritan ("Raritan") (hereinafter sometimes referred to individually as a "Party" or collectively as the "Parties").

WHEREAS, PSESG is a public utility corporation engaged in the provision of electric and gas service in the State of New Jersey and Raritan is a corporation operating a steel mill at its plant located in Perth Amboy, New Jersey ("Perth Amboy Plant") ; WHEREAS, Raritan in entering this Agreement is willing to forego the construction of a rod mini mill in another state, which would displace steel production from the Perth Amboy Plant, in the interest of securing the considerations from PSESG hereinafter set forth that will assist Raritan in both operating and investing in the improvement of the Perth Amboy Plant so as to enable it to more efficiently serve a competitive market for steel rod products, and more expeditiously and efficiently comply with regulatory goals for preservation of the environment;

WHEREAS, PSESG is desirous of maintaining Raritan as a customer which is a large source of demand for PSE&G's electric power, and which, through its employment of substantial number of New Jersey residents and contribution to New Jersey tad revenues, supports the economic base of Northern New Jersey;

WHEREAS, the Parties are of a view that the aforementioned factors are necessary and appropriate considerations which may be addressed in thus Agreement consistent with New Jersey utility polices; and

NOW, THEREFORE, in consideration of the foregoing and the promises and covenants hereinafter set forth, the sufficiency of which is hereby acknowledged, PSE&G and Raritan agree as follows:

1. Raritan Investment: Raritan will invest a minimum of $37 million in capital for replacement, refurbishment, upgrading and expansion of its Perth Amboy Plant and related operations in the Perth Amboy area, which area will be within PSE&G's electric service area, between January l, 1995 and

(a) forty-eight (48) months following the effective date of this Agreement, or

(b) forty-eight (48) months following issuance of all necessary permits by the New Jersey Department of Environmental Protection (DEP),

whichever of (a) or (b) is later, Raritan will file for the principal necessary DEP permits within ninety (90) days of the effective date of this Agreement. If Raritan fails to invest any portion of the $37 million in the Perth Amboy Plant and related operations as described above, within the above-described time period, this Agreement will terminate at that time (but in no event will the failure to receive a necessary DE? permit by Raritan cause such termination). In the event of termination, Raritan will remit to the State of New Jersey an amount calculated as the percentage of the $37 million not spent times 50.0041 per kWh times all the kWh's billed under this Agreement, as set forth in Paragraph 2, for the period beginning with the month the last necessary permit is issued by the DEP and ending with the termination of this Agreement.

2. Price. Electric service pricing under this Agreement shall be in two blocks. The first 13 million kWh and related demand ("Block 1"1 shall be billed monthly under the Agreement at prices, terms, and conditions identical to PSESG's then effective Rate Schedule High Tension Service (HTS) for transmission service or its successor rate except for the Levelized Energy Adjustment Charge iLEAC). Included in billing for Block 1 shall be the existing Facilities Charges and Duplicate Service Charges of 517,382.89 per month.

If the total kWh billed to Raritan in any billing month is less than 13 million kWh in total, the "related demand" for Block 1 shall be the actual metered demand as described in HTS. 2f the total kWh is greater than 13 million kWh, the Block 1 "related demand" shall be calculated by multiplying the actual metered demand as described in HTS by the ratio of 13 million kWh divided by the total kWh billed.

In lieu of the then current HTS LEAC applicabie to Block 1, an energy adjustment charge applicable to each of the kWh in Block 1 shall be structured as the sum of the following:

(i) The LEAC charge (credit effective 11/4/94 applicable to HTS transmission service of (1.3011) cents per kWh.

(ii) The net of the marginal energy cost per kWh as applicable to Block 2, adjusted for electrical losses valued at 1.2054% of the marginal energy cost less 2.2561 cents per kWh (1993 weighted average PJH billing rate adjusted for losses).

(iii) The Remediation Adjustment Charge applicable to HTS transmission.

(iv) The net of the DSH Recovery factor applicable to HTS transmission less 0.0625 cents per kWh.

The remaining kWh in each billing month ("Block 2") shall kWh charges structured as follows:

(i) A marginal energy cost (PJH Billing Rate or successor measure of marginal energy costs which shall vary hourly reflecting the marginal cost of energy to PSESG. PSESG shall use reasonable efforts to notify Raritan of the estimated level of these charges;

(ii) Electrical losses valued at i.2054E of the marginal energy cost;

(iii) Gross Receipts and Franchise Unit Tax set at 0.4 cents per kWh;

(iv) Remediation Adjustment Charge applicable to Rate Schedule HTS; and

(v) A fixed cost contribution of _____ cents per kWh On-Peak (8 AN to IO PK, Monday to Friday) and cents per kWh Off-Peak (all other hours).

Raritan's firm load may change from time to time over the term of this Agreement but shall not exceed 29,620 kW. The balance of Raritan's load shall be treated as interruptible upon not less than thirty (30) minutes prior notice to Raritan as provided for in HTS. interruptible credits shall be applied only to the difference between 29,620 kW (35% of Raritan's present peak load of 83,600kW) and Raritan's firm load which load is not to exceed 29,620 kW.

3. Effective Date: This Agreement shall become effective on the date on which the New Jersey Board of Public Utilities ("NJBPU") issues a final Order approving the Agreement in accordance with Paragraph 4; provided, however, if such date occurs after April 1, 2995, the terms and conditions of this Agreement shall be applied retroactive to April 1, 1995; and provided further, that if the final Order of the NJBPU approving this Agreement is not upheld on appeal and the Agreement becomes void in accordance with

Paragraph 4, Raritan shall pay PSESG the di22erence between the purchase rate under this Agreement and the otherwise applicable tari22 rate.

4. Conditions Precedent: The following shall be a condition precedent to the effectiveness of this Agreement: receipt by PSE&G and Raritan, of a final Order issued by the NJBPU approving this Agreement without modification or condition and specifically finding, throughout its term, that this Agreement is: (i) reasonable and prudent; (ii) entered into pursuant to State policy and is in the public interest; (iii) that the Gross Receipt and Franchise Unit Tax applicable to all kilowatthours billed under this Agreement shall be 5.004 per kilowatthour; and (iv) that for Levelized Energy Adjustment Charge (LEACI purposes, the cost o2 energy produced, purchased, and interchanged subject to recovery shall be reduced by an amount related to Raritan determined by multiplying the kWh's supplied to Raritan, pursuant to this Agreement adjusted 2or losses, by the average cost of energy produced, purchased and interchanged and, provided further, that the ;elated kWh's utilized in the determination o2 the cost recovery per kWh in the LEAC shall exclude all kWh's sold to Raritan pursuant to this Agreement.

Raritan and PSEaG shall each use its best efforts to promptly secure all such regulatory approvals and governmental authorizations. If the final Order issued by the NJBEU approves this Agreement without modifications(s) or condition(s) and makes the findings specified above, then the conditions precedent set forth in this Paragraph 4 shall be deemed satisfied.

In the event that the NJBPU approves this Agreement subject to modification(s) or condition(s) or fails to make the findings specified above, or an order of an appellate court, which is not subject to further appeal, fails to affirm the NJBPU Order approving this Agreement as provided for in this Paragraph 4, and either Party determines, in its sole discretion, that it is adversely affected, the Parties hereby agree that upon written notice to the other Party

(which shall be given no later than ten (101 days following the date on which the NJBPU issues a final Order or the appellate decision becomes nonappealable, as the case maybe), this Agreement shall be void.

Except as provided for in clauses (i) through (iv) of the first paragraph in this Paragraph 4, the provision in an order issued by the NJBPU or by an appellate court regarding the recovery of the difference between the tariff rate otherwise applicable to Raritan and the purchase rate under this Agreement shall not be deemed a "modification" or "condition" for purposes of this Paragraph 4.

5. Termination Date: This agreement shall terminate ten (10) years from its effective date.

6. Character of Service: The electric service provloed to Raritan pursuant to thls Agreement shall be subject to the terms and conditions (to the extent not in confilct with thls Agreement) and shall enjoy the same degree of availability and reliability, as provided by PSE&G to lts then effective retail tariff customers generally.

7. Taxes, Assessments or Other Charges: In the event that PSE&G incurs any taxes, assessments of or other charges in connection with the services to be provided hereunder, which were not applicable at the time of entering into this Agreement, including any increase in the Gross Receipts and Franchise Unit Tax, such taxes, assessments or other charges shall be passed through to Raritan as an increase in PSESG's costs of providing service hereunder. Although PSESG shall not have any obligation to challenge the imposition of any such tax, assessment or other charge, to the extent that such action is taken, either by PSE&G or another entity, and it results in monies that have been paid by Raritan being refunded, Raritan shall be entitled to receive a refund accordingly.

8. Liability and Insurance:

(a) Each Party will defend, indemnify and save the other Parry harmless from and against all liability, reasonable expenses (including legal expenses) costs and damages incurred by reason of bodily injury, death or damage co property caused by, or sustained on, each of its own facilities and arising from activities conducted pursuant to this Agreement. In no case shall a Party be liable under this indemnity provision unless said Party shall be notified in writing of the nature 02 the claim within a reasonable time after the assertion thereof, but failure to so notify a Party shall not relieve it from any liability which it may have otherwise than on account of this indemnification agreement. A Party shall be entitled to participate at its own expense in the defense, or, if it so elects, within a reasonable time after receipt of such notice, to assume the defense of any suit brought to enforce any such claim, but if it so elects to assume the defense, such defense shall be conducted by counsel chosen by it and approved by the other Party, which approval shall not be unreasonably withheld. In the event that a Party elects to assume the defense of any such suit and retains such counsel, the other Party snail bear the fees and expenses of any add12icnal counsel thereafter retained by them. No indemnification shall be required of a Party for amounts paid in settlement of any claim or litigation, commenced or threatened, unless such settlement is effected with the written consent of such Party. Each of the Parties shall be solely responsible for, and shall bear all costs of claims arising from any events caused by the actions of its own employees, contractors or agents, no matter where the event occurs, and each of the Paroles shall be solely responsible for, and shall bear all costs of claims by its own employees,

contractors or agents arising under and covered by any worker's compensation law.

(b) Each Party shall be responsible for the procurement and maintenance of its own property, casualty, contractual, and third-party liability insurance programs to protect adequately its respective liabilities and responsibilities as described in this Agreement. Upon request each Party shall furnish evidence of such insurance. The Parties shall secure waivers of all subrogation rights from their respective Insurers as a term of the insurance to be obtained hereunder.

(c) Neither Party or its officers, directors, partners, agents, servants, employees, affiliates parent, subsidiaries or successors or assigns Shari be liable to the other Party for claims for punitive, incidental, special, indirect or consequential damages whether such claim is based on a cause of action based in warranty, negligence, strict liability, contract, operation of law or otherwise, except where damages arise out of, relate to or result from the gross negligence of a Party, or the willful disregard by a Party of an obligation under this Agreement.

9. Laws, Regulations, Orders, Approvals and Permits: This Agreement is made subject to present and future local, state and federal laws and to the regulations or orders of any local, state or federal regulatory authority having jurisdiction over the matters set forth herein; and performance hereunder is conditioned upon securing and retaining such local, state or federal approvals, grants or permits as may from time to time be necessary with respect to such performance, including continuing to meet the conditions specified in Paragraph 4 of this Agreement. PSESG and Raritan agree to use their best efforts to secure and retain all such approvals, grants or permits necessary in order to accomplish the transactions set forth herein, including reasonable appeals to a higher authority.

10. Assignment: Party may, without relieving itself of any obligations under this Agreement, assign any of its rights hereunder (i) to any company with which it is affiliated or (ii) as security for indebtedness. Otherwise, no assignment of this Agreement or any of the rights or obligations hereunder will be made unless or until the Party seeking the assignment obtains the written consent thereto of the non-assigning Party. Such consent may be given or withheld by the non-assigning Party in its sole discretion.

11. Exclusivity: Raritan agrees, unless mutually agreed to otherwise by the Parties in writing, that the electric service provided by PSE&G under this Agreement shall be the sole source of electrical power for the Perth Amboy Plant during the term of this Agreement.

12. Confidentiality: This Agreement, and information disclosed pursuant to this Agreement, shall be kept confidential by PSE&G and Raritan except as required by law, regulation or order of governmental authority.

During the term of this Agreement, it may become necessary or desirable, from time to time, for one Party to provide the other Party with information which is either privileged, confidential or proprietary. The Party desiring to protect any such information (the labeling Party) may label such information as either privileged, confidential or proprietary and thereafter the other Party will not reproduce, copy, use or disclose (except when required by governmental authorities or in connection with obtaining requisite governmental licenses, permits or approvals) any such information in whole or in part for any purpose without the written consent of the labeling Party, which consent will not be unreasonably withheld. Each Party may use any such copy, the information contained therein or both, only in the exercise of its respective rights and obligations pursuant to this Agreement. Each Party will take all reasonable steps to protect the other Party's proprietary, privileged, or confidential information, including, but not limited to, by (l) restricting its use internally on a "need -to-know" basis, (2)

obtaining appropriate confidentiality agreements from those employees, agents, and contractors to whom such information may be otherwise disclosed under this Agreement and (3) ensuring the return of all copies of labeled information to the labeling Party. The respective mortgagees and security deed holders of the Parties will be entitled to inspect (but not to copy) any information labeled by one of the Parties that has been designated as proprietary, privileged, or confidential by another person or entity. In disclosing privileged, confidential or proprietary information to governmental authorities, the disclosing Party will cooperate with the labeling party in minimizing the amount of such information furnished, including the redaction of information appearing on specific documents as Js appropriate under the circumstances. At the specific request of the labeling party, the other Party will use reasonable best efforts to secure the agreement of such governmental authorities to maintain specified portions of such information in confidence.

13. Survival of Obligations: The applicable provisions of this Agreement shall continue in effect after termination of this Agreement to the extent necessary to provide for final billing, billing adjustments, payments and disposition of any claims outstanding. The confidentiality provisions of this Agreement shall survive termination of this Agreement.

14. Severability of Provisions: Exempt as provided for in Paragraph 4, a holding by any Court or governmental agency having jurisdiction that any provision of this Agreement is invalid shall not result in the invalidation of the entire Agreement unless :t :s substantially and materially altered, thereby defeating the intent of the Parties to the Agreement.

15. Interpretation: The interpretation and performance of this Agreement shall be in accordance with, and controlled by, the laws of the State of New Jersey without recourse to principles governing conflicts of law. Any dispute or claim under this Agreement shall be litigated :n a New Jersey state

court or agency or in the United States Federal District Court for the District of New Jersey.

16. Representations and Warranties of the Parties: The Parties, by executing this Agreement, represent and warrant that:

(a) The persons executing this Agreement are officers of Raritan and PSESG, as the case may be, and are duly authorized to execute same on its behalf;

(b) Raritan and PSEaG each has all necessary corporate authorizations to enter into this Agreement; and

(c) Raritan and PSESG's commitments under this Agreement and its performance thereunder will not result in a violation of any other agreement to which Raritan or PSESG, as the case may be, is a Party or may be legally bound.

The Parties agree to indemnify the other, defend and hold harmless the other Party for all damages (including attorney fees), direct and consequential, arising out of the breach of any of the representations and warranties in this Paragraph 16.

17. Miscellaneous:

(a) Each Party shall prepare, execute and deliver to the other Parties any documents reasonably required to implement any provision hereof.

(b) Any number of counterparts of this Agreement may be executed and each shall have the same force and effect as the original.

(c) This Agreement shall constitute the entire understanding between the Parties related to the matter herein and shall supersede any and all previous understandings pertaining to the subject matter of this Agreement.

(d) This Agreement may be modified only by an instrument in writing signed by the Parties hereto.

(e) Nothing contained herein shall be construed as affecting in any way the right of PSE&G to make application to the NJBPU for a change in tariff rates pursuant to the Commission's Rules and Regulations.

18. Notice and Addresses: Any notice, request, demand, statement or payment provided for in this Agreement shall be sent to the Parties hereto at the following address:

PSE&G: PUBLIC SERVICE ELECTRIC AND GAS COMPANY
80 Park Plaza - 7th Floor
Newark, New Jersey 07101
Attn: Frederick Lark
Vice President - Marketing
Facsimile: (201) 624-2788

Raritan: Co-Steel Raritan
225 Elm Street
P.O. Box 309
Perth Amboy, New Jersey 08862
Attn: Ed M. Calanog, Ph.D., President

Any notice, request or demand shall be deemed to have been made hereunder at such tome as same has been deposited and stamped in registered United States mail, postage prepaid.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be signed by their respective duly authorized representatives as of the date first above written.

CO-STEEL RARITAN

By:_____.
Title: President

PUBLIC SERVICE ELECTRIC AND GAS COMPANY

By: /s/_____
Thomas M. Crimmins, Jr.
Title: Senior Vice President

DATED: November 14, 1994

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be signed by their respective duly authorized representatives as of the date first above written.

CO-STEEL RARITAN

By:/s/_____

Title: President

PUBLIC SERVICE ELECTRIC AND GAS COMPANY

By: /s/_____

Thomas M. Crimmins, Jr.

Title: Senior Vice President

DATED: November 14, 1994

February 28, 1995

In the Matter of the Petition of
Public Service Electric and Gas Company
for Approval of its Proposed Experimental
Hourly Energy Pricing Tarriff

and

In the Matter of a Joint Petition of
Public Service Electric and Gas Company
and Co-Steel Raritan for Approval of
(1) the Service Agreement and
(2) a Protective Order for Confidential Information

BPU Docket No. ER95010005

Foster DeReitzes, Esq.
Brickfield, Brucbette. Rim P.C.
1025 Thomas Jefferson Street N.W.
Eighth Floor, West Tower
Washington, D.C. 20007

Dear Mr. DeReitzes:

Confirming our telephone conversation of Thursday, February 23, 1995, it was agreed that Experimental Hourly Energy Pricing Service Agreement between Co-Steel and Public Service Electric and Gas Company will be changed to correct a transportation of a number in Raritan's firm load as listed in the first full paragraph on page 5 of the above-referenced agreement The number erroneously included in ale

agreement is 29.620; whereas, the correct number is 29,260 kW.

The first full paragraph on page 5 of the Agreement currently reads as follows:

Raritan's firm load may change from time to time over the term of this agreement but shall not exceed 29,620 kW. The balance of Rantan's load shall be treated as interruptible upon not less than thirty (30) minutes prior notice to Raritan as provided for in HTS. Interruptible credits shall be applied only to the difference between 29,620 kW (35% of Raritan's present peak load of 83,600 kW) and Raritan's firm load which load is not to exceed 29,620 kW.

The above paragraph should be modified to read as follows:

Raritan's firm load may change from time to tithe over the term of this Agreement but shall not exceed 29,260 kW. The balance of Raritan's load shall be treated as interruptible upon not less than thirty (30) minutes prior notice to Raritan as provided for in HTS. Interruptible credits shall be applied only to the difference between 29,260 kW (35% of Raritan's present peak load of 83,600 kW) and Raritan's firm load which load is not to exceed 29,260 kW.

Please execute the bottom of this letter which has been sent in duplicate thereby agreeing on behalf of your client, Co-Steel Raritan, that the above-referenced agreement shall be modified to correct the transposed number as noted above.

Very truly yours,
/s/

I hereby agree on behalf of Co-Steel Raritan
that the agreement between Co-Steel Raritan
and Public Service Electric and Gas Company
hereby shall be modified as shown above.

/s/_____ _____

Foster DeReitzes, Esq. Date

ATTACHMENT C

LEAC ACCOUNTING

1. The unamortized balances of DZAC-recoverable costs amortized on a straight-line basis only the same amount per month, which currently are nuclear decommissioning costs, an NPS reward, the 1991 Salem penalty, a GRIT true-up, the EDHI affiliation fee, HUG contract buyout costs and DS" costs) shall continue to be credited, and the income statement debited, by the monthly amounts that would be credited and debited in the absence of the Co-Steel Raritan transaction.

2. in determining the monthly deferral of energy costs recoverable by the LEAC,

   (a) in accordance with the accounting currently employed with the LEAC, the monthly amortizations noted in Paragraph 1 above, and the total energy costs subject to recovery by the LEAC In that month, shall be deducted from the LZAC revenue and related base rate revenue for energy costs received in that month (the LEAC base cost per kwh times the kwh sales to which the LEAC Is applied in the month) , and the difference debited, if negative (credited, if positive) to Account E186.510, the deferred debit (balance sheet asset) account In which th8 unamortized balance of deferred energy costs recoverable by its LEAC 16 recorded. The corresponding credit (debit if the revenue/cost difference is positive) shall be to Account E501.200, the Income statement expense account in which offsets to monthly energy cost under or overrecoveries are recorded.

(This is the current accounting procedure, and assuming the LEAC charge was estimated perfectly and there were no monthly variation in costs and sales, Accounts E186.510 and E501.200 would be debited and credited, respectively, to record underrecoveries exactly equal to the LEAC and related base revenue to energy costs no longer received from Co-Steel Raritan in each month. The adjustment below is accordingly needed to eliminate these underrecoveries i.e., the increase in the balance of LEAC-recoverable deferred costs that would otherwise occur without the adjustment.)

(b) To adjust for the fact that the LEAC charge and related base cost per kwh will no longer be applied to the Co-Steel Raritan sales, while the energy and other costs incurred In serving Raritan will still be included in the fuel, purchased power and other accounts in which the costs subject to LEAC recovery are recorded, Accounts E186.810 and E5QI.ZXx will additionally be credited and debited, respectively, by an amount determined by multiplying the monthly sales to Co-Steel Raritan by the sum of the HTS LEAC rate in effect in that month and the LEAC base cost per kWh (currently 3.5 cents per kWh). Since the monthly credits are based on the LEAC charge, they include the portions of the amortization of non-energy costs recoveable by the LEAC, as well as prior-period deferred costs, if any, that would have been recovered from Co-Steel Raritan if it remained an HTS customer.

(On an annual basis, and at the LEAC rate currently in effect and level of Co-Steel Raritan sales assumed in the petition, the credit to the deferred balance would be $10.113

million (445,920 kWh ($0.035/kwh - 0.012322/kwh)).

(c) The net of the accounting entries described in (a) and (b) above will be accompanied by appropriate deferred tax debits and credits.

3. This accounting will be retroactive to April 1, 1995, reflecting the fact that billings to Co-Steel Raritan under the Service Agreement are to be retroactive to that date.

ATTACHMENT D

MEMORANDUM OF UNDERSTANDING

This Memorandum dated this 20th day of July, 1995, will set forth the understanding reached among the New Jersey Department of the Treasury ("Treasury"), Co-Steel Raritan ("Raritan"), and Public Service Electric and Gas Company ("PSE&G"), regarding the rate of certain State of New Jersey taxation applicable to purchases of electricity by Raritan from PSE&G under its Experimental Hourly Energy Pricing Service Tariff and the November 14, 1994 agreement (the "Service Agreement") Raritan and PSE&G entered into thereunder.

Under the Service Agreement, PSE&G agrees to provide a new service offering for electric service to Raritan's steel rod mill at Perth Amboy, N.J., at specified rates for a ten-year term.. The Service Agreement states that "Raritan in entering this Agreement is willing to forgo the construction of a rod mill in another state, which would displace steel production from the Perth Amboy Plant" and that "PSE&G is desirous of maintaining Raritan as a customer which is a large source of demand for PSE&G's electric power." The Service Agreement is to become effective upon its approval by the New Jersey Board of Public Utilities ("BPU"), which has not yet been given.

The Service Agreement provides, among other things, that Raritan is to invest a minimum of $37 million in capital for replacement, refurbishment, upgrading and expansion of the Perth Amboy plant within four years after issuance of all necessary permits by the New Jersey Department of Environmental Protection. The Service Agreement as originally agreed to between Raritan and PSE&G further provides that the Gross Receipts and Franchise Unit Tax ("GRFT") for the above-referenced new service offering applicable to all kilowatthours billed under the agreement is

to be $.004 per kilowatthour, a reduction in approximately $.0041 from the GRFT rate that would otherwise apply.

On June 23, 1995, the parties hereto met, along with BPU and other State governmental officials, to discuss the extent to which Treasury in fact is willing to agree to a new GRFT rate applicable to the kilowatthour sales under the Service Agreement, and the following sets forth the understanding reached among the parties at the conclusion of the meeting:

(1) The GRFT rate applicable to all kilowatthours under the Service Agreement shall be $0.005295 per kilowatthour, which results in a reduction of approximately $1.25 million per year from the GRFT that would otherwise apply. Based on an assumed current annual usage of 445,000,000 kilowatthours, the State of New Jersey would collect GRFT of approximately $2.36 million per year. (The Service Agreement shall be revised to reflect such $0.005295 per kilowatthour rate.)

(2) Regarding the $37 million capital investment in the Perth Amboy plant which the Service Agreement requires Raritan to make, Raritan will, to the greatest extent possible and reasonable, expend such $37 million using New Jersey vendors and labor (this commitment already being reflected in a June 27, 1995 letter from Raritan to Treasury.)

(3) In the event Raritan is able to qualify for an investment tax credit, under the Manufacturing Equipment and Employment Tax Credit Act enacted July 7, 1993, with respect to any portion of the $37 million capital investment in the Perth Amboy plant which the Service Agreement requires Raritan to make, Raritan agrees to pay Treasury any portion of such credit utilized relating to the $12.4 million in phase II fume system and scrap yard expansion equipment as to which qualification for the credit is described as uncertain in Raritan 's June 28, 1995 letter to Treasury (including attachment thereto) attached to this Memorandum, provided that such

payments by Raritan shall not exceed a total $248,000 as described in such June 28, 1995 letter.

(4) In the event that , during the term of the Services Agreement, the State of New Jersey enacts any regulation or legislation which either substantially alters the computation of the GRFT or wholly or partly replaces it with another form of tax, Treasury will reduce the amount of tax due on account of the Service Agreement under such altered GRFT or other form of tax by the percentage by which the GRFT (had it not been so altered or replaced) would have been reduced under this Memorandum of Understanding.

NEW JERSEY DEPARTMENTOF THE TREASURY

By: /s/_____

PUBLIC SERVICE ELECTRIC AND GAS COMPANY

By: /s/_____

CO-STEEL RARITAN

By: /s/_____

June 28, 1995

Via Telecopier (to: 609-984-3990)

Mr. Jame DiEleuterio
Assistant State Treasurer for
Tax Policy
NJ Department of the Treasury
CN 002
Trenton, NJ 08625

Dear Mr. DeEleuterio:

Re: Co-Steel Rarian/PSE&G
Discounted Rate - GRFT Unit Tax Rate

At our meeting with you and other Treasury officials on Friday, June 23, 1995, Co-Steel Raritan ("Raritan") was asked to furnish you information regarding its current assumptions on the extent to which its proposed $37 million capital investment in the Perth Amboy steel mill will result in the availability of investment tax credits to Raritan. The specific tax law at issue is the Manufacturing Equipment and Employment Investment Tax Credit Act (the "ITC Act"), which was enacted July 7, 1993 and applies to Raritan's tax years beginning January 1, 1994.

I enclose an analysis showing our assumption as to the tax credit the investment might generate over a two to four year period. You will note that the $37 million falls into two different categories, with $24.6 million assumed to be qualifying capital equipment and with the remaining $12.4 million being either uncertain or not qualifying. A larger question exists, however, as to whether any of this credit is

available. Rartian already avails itself, to the full extent permissible (i.e., up to 50 percent of the tax liability otherwise due), of the recycling credit. Whether Raritan also may receive the investment tax credit depends on whether the 50 percent limitation in the ITC Act is interpreted to be correct. However, if the 50 percent limit applies to the aggregate of the credits, Raritan will be unable to benefit from any ITC Act credit.

I hope this provides you the information you sought. Please feel free to call me if you have any questions, and I look forward to further discussing the is with you and your colleagues later this week.

Sincerely,

/s/
Vincent C. Dimicelli
Controller

VCD: el
Enclosure
cc: David Kehler
James Archibald
Robert Chilton (BPU)
Larry Gerrtieu (BPU)
Lorenza Evans (DAG)
Kurt Lewandowski (Ratepayer Advocate)
Robert Dougherty (PSE&G)
Roger Carracho (PSE&G)
W.J. Shields
Anthony R. Coscia
Foster DeReitzes

CO - STEEL RARITAN

CAPITAL EXPANSION

CAPITAL EQUIPMENT

PHASE II MELT SHOP EXPANSION	$9,100,000
PHASE II MELT SHOP EXPANSION	$9,200,000
ROD MILL EXPANSION	$6,300,000
TOTAL CAP. PROJ. QUALIFYING FOR I.T.C.	**$24,600,000**
PHASE II FUME SYSTEM EXPANSION	$7,150,000
SCRAP YARD EXPANSION	$5,250,000
TOTAL CAP. PROJ. THAT MAY QUALIFY FOR I.T.C.	**$12,400,000**
TOTAL CAPITAL EXPANSION	**$37,000,000**

INVESTMENT TAX CREDIT

TOTAL CAP. PROJ. QUALIFYING FOR I.T.C.	$492,000
TOTAL CAP. PROJ. THAT MAY QUALIFY FOR I.T.C.	$248,000
TOTAL CAPITAL EXPANSION	**$740,000**

Supreme Court, U.S.
FILED
MAY 30 2001
CLERK

No. 00-1393

IN THE

Supreme Court of the United States

October Term, 2000

CO-STEEL RARITAN,

Petitioner,

v.

NEW JERSEY BOARD OF PUBLIC UTILITIES,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New Jersey

SUPPLEMENTAL APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

Philip L. Chabot, Jr.
Counsel of Record

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May 31, 2001

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SUPREME COURT OF NEW JERSEY
A-139/140/147 September Term 1999

IN THE MATTER OF PUBLIC SERVICE ELECTRIC AND GAS COMPANY'S RATE UNBUNDLING, STRANDED COSTS AND RESTRUCTURING FILINGS

IN THE MATTER OF THE PETITION OF PUBLIC SERVICE ELECTRIC AND GAS COMPANY FOR A BONDABLE STRANDED COST RATE ORDER IN ACCORDANCE WITH CHAPTER 23 OF THE LAWS OF 1999, TO AUTHORIZE THE IMPOSITION OF A NONBYPASSABLE TRANSITION BOND CHARGE, TO AUTHORIZE THE SALE OF BONDABLE TRANSITION PROPERTY, THE ISSUANCE AND SALE OF NOT TO EXCEED $2.525 BILLION AGGREGATE PRINCIPAL AMOUNT OF TRANSITION BONDS BY A FINANCING ENTITY TO RECOVER PETITIONER'S BONDABLE STRANDED COSTS, AND THE APPLICATION OF TRANSITION BOND PROCEEDS TO RETIRE OUTSTANDING UTILITY DEBT, EQUITY OR BOTH, AND TO APPROVE THE FORMULA FOR THE CALCULATION AND ADJUSTMENT OF THE TRANSITION BOND CHARGE AND MARKET TRANSITION CHARGE AND MARKET TRANSITION CHARGE- TAX RELATED THERETO.

Argued November 8, 2000 -- Decided May 18, 2001

On certification to the Superior Court, Appellate Division, whose opinion is reported at 330 N.J. Super. 65 (2000).

Phyllis J. Kessler argued the cause for appellant New Jersey Business Users (Kudman Trachten Kessler

Newman & Rich and Goldberg, Mufson & Spar, attorneys; Ms. Kessler and Jeffery L. Kantowitz, on the briefs).

Blossom A. Peretz, Ratepayer Advocate, and Gregory Eisenstark, Deputy Ratepayer Advocate, argued the cause for appellant Division of the Ratepayer Advocate (Ms. Peretz, attorney; Mr. Eisenstark, Diane Schulze, Assistant Deputy Ratepayer Advocate and Nusha Wyner, Kurt S. Lewandowski and Ami Morita, Deputy Ratepayer Advocates, on the briefs).

Philip L. Chabot, Jr., a member of the District of Columbia bar, argued the cause for appellant Co-Steel Raritan (Pearson and Shapiro, attorneys).

Helene S. Wallenstein, Senior Deputy Attorney General, argued the cause for respondent New Jersey Board of Public Utilities (John J. Farmer, Jr., Attorney General of New Jersey, attorney; Andrea M. Silkowitz, Assistant Attorney General, of counsel).

John A. Hoffman argued the cause for respondent Public Service Electric and Gas Company (Francis E. Delany, Jr., Corporate Rate Counsel and Wilentz, Goldman & Spitzer, attorneys; Mr. Hoffman, Mr. Delany, James T. Foran, R. Edwin Selover, Anne S. Babineau and Matthew M. Weissman, of counsel and on the briefs).

James E. McGuire argued the cause for respondent New Jersey Commercial Users (Reed Smith Shaw & McClay, attorneys).

Gerald W. Conway argued the cause for respondent Jersey Central Power & Light Company, d/b/a GPU Energy (Thelen Reid & Priest, attorneys; Mr. Conway and Marc B. Lasky, of counsel; Pauline Foley, on the brief).

William Harla argued the cause for respondent Independent Energy Producers of New Jersey (DeCotiis, Fitzpatrick, Gluck, Hayden & Cole, attorneys).

Michael J. Mehr argued the cause for respondent Tosco Refining Company (Waters, McPherson, McNeill, attorneys).

Stephen B. Genzer submitted a brief on behalf of respondent Atlantic City Electric Company (LeBoeuf, Lamb, Greene & MacRae, attorneys; Mr. Genzer, Mark L. Mucci and Colleen A. Foley, on the brief).

Murray E. Bevan submitted a brief on behalf of respondent Enron Energy Services, Inc. (Courter, Kobert, Laufer & Cohen, attorneys; Richard P. De Angelis, Jr., on the briefs).

James C. Meyer submitted a letter in lieu of brief on behalf of respondent Rockland Electric Company (Riker, Danzig, Scherer, Hyland & Perretti, attorneys).

PER CURIAM

Plaintiffs in this case have challenged the August 24, 1999 Final Decision and Order ("Final Order") issued by the Board of Public Utilities ("BPU") in respect of Public Service Electric and Gas Company's ("PSE&G") rate unbundling, stranded cost and corporate restructuring filings. Also at issue is the validity of the BPU's September 17, 1999 Bondable Stranded Costs Rate Order ("BSCRO"), issued in response to PSE&G's petition to securitize its recovery-eligible stranded costs.

The Appellate Division upheld both the BPU's Final Order and BSCRO. Following arguments on November 8, 2000, this Court issued an order disposing of the matter without an accompanying opinion because of the need for an expeditious resolution of the plaintiffs' challenge. That order announced our decision affirming the judgment of the Appellate Division. Although we rely substantially on the reasons expressed in Judge King's thorough and well-reasoned opinion, we take this opportunity to elaborate on that

opinion and respond to the concerns of our dissenting colleague.

I

On April 30, 1997, the BPU issued a report entitled "Restructuring the Electric Power Industry in New Jersey: Findings and Recommendations" ("Final Report"). The Final Report recommended in part that by July 2000 all of the state's retail customers should be able to select their electric power suppliers, and that rate reductions of from five to ten percent should be implemented during the phase-in of retail competition. Under the Agency's proposed restructuring, the generation component of electric power production would be competitively priced on the open market.

The BPU's order adopting the Final Report required the existing four utility monopolies, PSE&G, Jersey Central Power & Light Company, Rockland Electric Company and Atlantic Electric Company, each to submit three filings to the BPU: a rate unbundling petition, a stranded cost petition, and a restructuring plan. The rate unbundling petitions involve the manner in which the single, per-kilowatt-hour charge would be separated into its component parts (generation, transmission and distribution); the stranded cost filings relate to the utilities' right to recover some portion of the overmarket (stranded) costs that would have been recovered had they continued as regulated monopolies; and the restructuring filings relate to the reorganization of the four utilities, focusing on the utilities' divestiture of generating assets, including the valuation of the transferred assets where, as here, those assets are transferred to an unregulated affiliate. The BPU's Final Order addressed PSE&G's submissions and was issued pursuant to the Electric Discount and Energy Competition Act ("EDECA"), N.J.S.A. 48:3-49 to 98,[1] enacted in February 1999.

---

[1] EDECA authorized the BPU to (1) "permit competition in the electric generation and gas marketplace" and "thereby reduce the aggregate energy

This is the first case involving one of the state's utility monopolies to receive final agency review. An appeal from the Final Order was taken by the Division of the Ratepayer Advocate ("Ratepayer Advocate" or "RA"), New Jersey Business Users ("NJBUS"), a group of large industrial and commercial customers, and Co-Steel Raritan ("Co-Steel"), one of PSE&G's largest commercial customers. In re PSE&G Co.'s Rate Unbundling, Stranded Costs and Restructuring Filings, 330 N.J. Super. 65 (2000). We granted the petitions for certification filed by the Ratepayer Advocate and NJBUS, and granted in part the petition for certification filed by Co-Steel, limited to the issues concerning rate reduction. Certification was denied on Co-Steel's contract impairment claim. 165 N.J. 489 (2000).

II

This case implicates questions of statutory interpretation and executive agency decision making. When considering the meaning of a statutory provision, absent any legislative intent to the contrary, courts must give effect to the language of the provision. Phillips v. Curiale, 128 N.J. 608, 617-18 (1992); Renz v. Penn Cent. Co., 87 N.J. 437, 440 (1981). When a statute is ambiguous, however, "[w]e are . . . warranted in placing considerable weight on the construction of the statute . . . by the administrative agency charged by the statute with the responsibility of making it work." The Passaic Daily News v. Blair, 63 N.J. 474, 484 (1973). Because "[t]he grant of authority to an administrative agency is to be liberally

---

rates currently paid by all New Jersey consumers"; (2) "[p]rovide for regulation of new market entrants in the areas of safe, adequate and proper service and customer protection"; (3) "[r]elieve electric public utilities from traditional utility rate regulation" for services provided in a competitive market; (4) provide electric public utilities "the opportunity to recover above-market power generation and supply costs. . . associated with the restructuring of the electric industry"; and (5) "[p]rovide [the BPU] with ongoing oversight and regulatory authority to monitor and review composition of the electric generation and retail power supply marketplace in New Jersey . . . ." N.J.S.A. 48:3-50(c).

construed to enable the agency to accomplish the Legislature's goals," Gloucester Cty. Welfare Bd. v. State Civil Serv. Comm'n, 93 N.J. 384, 390 (1983), we defer to "[t]he agency's interpretation . . . provided it is not plainly unreasonable." Merin v. Maglaki, 126 N.J. 430, 437 (1992). Likewise, when reviewing an administrative agency's factual findings, our function is not to substitute our judgment for that of the agency, particularly when that judgment reflects agency expertise. Flanagan v. Department of Civil Serv., 29 N.J. 1, 12 (1959); see Close v. Kordulak Bros., 44 N.J. 589, 599 (1965) (stating that courts should afford due deference "to the agency's expertise where such expertise is a pertinent factor").

The proceedings and decisions in this matter involve rate making by the BPU, "to which the Legislature has delegated its rate-making power, [and which] is vested with broad discretion in the exercise of that authority." In re Public Serv. Coordinated Transp., 5 N.J. 196, 214 (1950). "[T]he BPU's authority over utilities, like that of regulatory agencies generally, extends beyond powers expressly granted by statute to include incidental powers that the agency needs to fulfill its statutory mandate." In re Alleged Violations of Law by Valley Rd. Sewerage Co., 154 N.J. 224, 235 (1998); see In re Elizabethtown Water Co., 107 N.J. 440, 449-50 (1987) ("The Legislature has endowed the BPU with broad power to regulate public utilities. . . . [and] considerable discretion in exercising those powers."). We have long recognized that

> [a]dministrative agencies possess the ability to be flexible and responsive to changing conditions. See Heir v. Degnan, 82 N.J. 109, 121 (1980). This flexibility includes the ability to select those procedures most appropriate to enable the agency to implement legislative policy. See N.J.S.A. 52:14F-7(a) (Supp. 1981). Therefore, agencies sometimes develop hybrid proceedings possessing characteristics of both adjudication and rulemaking. See Cunningham, supra, 69 N.J. at 21 (public utility

> ratemaking procedures, although quasi-legislative in origin, are conducted like quasi-judicial proceedings); N.J.A.C. 1:1-1.6(a)(3). In fact, courts and commentators have encouraged hybrid agency proceedings as a way of producing more reasoned agency decisions, especially in complex and controversial policy areas. See, e.g., International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 649 (D.C. Cir. 1973); id. at 651-652 (Bazelon, C. J., concurring); Bazelon, "Coping with Technology Through the Legal Process," 62 Cornell L. Rev. 817, 824-826 (1977); Stewart, "Vermont Yankee and the Evolution of Administrative Procedure," 91 Harv. L. Rev. 1805, 1812-1814 (1978).
>
> [Texter v. Department of Human Serv., 88 N.J. 376, 385 (1982).]

Accordingly, upon the exercise of its broad authority and the conduct of appropriate proceedings, "the Board's rulings are entitled to presumptive validity and will not be disturbed unless we find a lack of 'reasonable support in the evidence.'" In re Jersey Cent. Power & Light Co., 85 N.J. 520, 527 (1981) (quoting In re New Jersey Power & Light Co., 9 N.J. 498, 509 (1952)); see also N.J.S.A. 48:2-46 (stating that courts may set aside BPU's order, in whole or in part, only "when it clearly appears that there was no evidence before the [BPU] to support the same reasonably or that the same was without the jurisdiction of the [BPU]").

In this case, beginning as early as 1995, the BPU held numerous public hearings, solicited comments from the public and interested parties and facilitated negotiation sessions between and among those parties. Following the issuance of the Final Report in 1997, the BPU and an Administrative Law Judge ("Administrative Law Judge" or "ALJ") conducted trial-type proceedings, receiving testimony and evidence on PSE&G's unbundling, stranded cost and corporate

restructuring filings. The BPU also retained an independent auditor to audit those filings and to assist in calculating PSE&G's stranded costs. An extensive record, consisting of a continuum of testimony, evidence, reports, findings and proposals received in contemplation of and subsequent to the enactment of EDECA, supports the BPU's Final Order and BSCRO.

The BPU was required to balance complex and competing interests and did so. The record demonstrates that the Final Order and BSCRO represent the culmination of years of agency review, including the negotiations and agreements reached between PSE&G and seven other interveners. We note that as a part of the discussions, PSE&G agreed to absorb a $250 million reduction in the amount of its unsecuritized stranded costs to the benefit of ratepayers. Under those circumstances, substituting our judgment for that of the agency would be unwarranted unless we were firmly convinced, and we are not, that the agency had abused its discretionary powers. We decline, also, to reject specific elements of the BPU's decision because we find that each element is separately sustainable and because we accept the agency's representation that the Final Order and BSCRO function as an integrated whole in which the parts are related and interdependent.

III

A

Our dissenting colleague, however, believes that the "statute is crystal clear" in requiring that the five percent transition rate reduction is to be measured from 1997 rates. Post at 11 (slip op. at __). That reduction spans the initial thirty-six months when retail choice is to be phased in under EDECA. See N.J.S.A. 48:3-52(d). The dissent contends that the BPU ignored clear statutory language and its own public positions when the agency ordered the five percent reduction

from 1999 rates, which include a 3.9% rate increase approved in April 1998. Post at 9-11 (slip op. at __).

N.J.S.A. 48:3-52(d) provides:

> d. (1) During a term to be fixed by the board, each electric public utility shall reduce its aggregate level of rates for each customer class, including any surcharges assessed pursuant to this act, by a percentage to be approved by the board, which shall be at least 10 percent relative to the aggregate level of bundled rates in effect as of April 30, 1997, subject to the provisions of paragraph (2) of this subsection.
>
> (2) The board may set a term for an electric public utility to phase in a rate reduction of ten percent or more during the first 36 months after the starting date for the implementation of retail choice as provided in subsection a. of section 5 of this act; provided, however, that, on the starting date for the implementation of retail choice as provided in subsection a. of section 5 of this act, each electric public utility shall reduce its aggregate level of rates for each customer class, including any surcharges assessed pursuant to this act, by no less than five percent.
>
> [(Emphasis added).]

Subsection (d)(1) mandates that each electric utility shall reduce its aggregate level of rates for each customer class by no less than ten percent "relative to the aggregate level of bundled rates in effect as of April 30, 1997." Subsection (d)(2) provides that the reduction shall be phased in over a period of three years, with an initial reduction of at least five

percent. By its terms, subsection (d)(1) deals with the overall ten percent rate reduction to be achieved as measured against the rates in effect on April 30, 1997. Absent from the text of subsection (d)(2), however, is any mention of a benchmark time period from which the five percent reduction is to be measured.

Contrary to the dissent, we conclude that the drafters intentionally left out of subsection (d)(2) a measuring date for the initial rate reduction in order to allow the BPU to exercise its discretion when phasing in the entire ten percent required. Indeed, the plain language of subsection (d)(2) states that the BPU may "set a term for an electric public utility to phase in a rate reduction." N.J.S.A. 48:3-52(d)(2). Even the Ratepayer Advocate's March 29, 1999 proposed stipulation of settlement states that the initial five percent reduction should be measured from current 1999 rates:

> The **Better Choice Settlement Proposal**, consistent with the requirements of the Energy Competition Act, would require PSE&G's [sic] to reduce its overall rates according to the following schedule (reductions are cumulative):
>
> August 1, 1999 - 5% reduction from current rates; . . . .
>
> [Ratepayer Advocate's Settlement Proposal at 10.]

Although the Ratepayer Advocate's settlement proposal was not accepted, we assume the 1999 benchmark would not have been suggested by the Ratepayer Advocate if she believed that date to be in derogation of the statute.

We observe as well that one of the critical objectives of EDECA is to implement rate reductions without impairing the financial integrity of the utilities. N.J.S.A. 48:3-50(c)(4). The BPU's approach, which begins with an initial reduction of five percent from 1999 rates and gradually introduces the full reduction over three years, is consistent with this goal. See Fiore v. Consolidated Freightways, 140 N.J. 452, 466 (1995)

("Our task is to harmonize the individual sections and read the statute in the way that is most consistent with the overall legislative intent."). We therefore hold that the Agency's approach is a plausible and "a permissible interpretation of the legislation, [well] within the discretion of the agency."[2] In re Schedule of Rates for Barnert Mem'l Hosp., 92 N.J. 31, 42 (1983).

B

Our dissenting colleague also joins in the petitioners' objection to PSE&G's accelerated amortization of its excess depreciation reserve fund and use of those amortization amounts to partially fund the utility's rate reductions and stranded costs recovery. Post at 12 (slip op. at __). The excess-depreciation reserve fund resulted from changing the useful life of the company's distribution plant investments from twenty-eight years to forty-five years. By lengthening the useful life of its assets, a substantial excess depreciation reserve accrued on PSE&G's balance sheet. The BPU approved PSE&G's amortization of that $568.7 million excess depreciation reserve over three years and seven months, beginning January 1, 2000 and ending July 31, 2003, by establishing amortization amounts of $125 million in 2000, $125 million in 2001, $135 million in 2002 and $183.7 million in 2003. Those amounts are to be recorded in the appropriate year as credits against expenses, thereby

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[2] The dissent relies on various statements made by the BPU before EDECA was enacted as evidence of the Agency's understanding that the interim five percent rate reduction should be measured from 1997 rates. Post at 9-11 (slip op. at __). That reliance is misplaced. The drafting of EDECA was an ongoing and fluid process, beginning as early as March 1995 and ending with EDECA's passage in February 1999. It is the Agency's Final Order that reflects its final view in respect of the statute's dictates. Further , the BPU's statements are arguably ambiguous and may be read to suggest only that the total reduction must reduce 1997 rates by ten percent. That leaves only the Assembly and Senate Legislative Fiscal Estimate, post at 11 (slip op. at __), prepared by the Office of Legislative Services, a slender reed on which to overturn the BPU's Final Order.

increasing PSE&G's ability during the transition period to absorb the financial impact of the rate reductions mandated by EDECA. This scheme, contends the dissent, "might very well violate the letter and spirit of EDECA, create a windfall for PSE&G, and undermine public confidence in the fairness of the Final Order." Post at 18 (slip op. at __).

We agree with the Appellate Division that "there is nothing in [EDECA] to prohibit deferred accounting." In re PSE&G, supra, 330 N.J. Super. at 114. Although there are statutory provisions in relation to the required level of rate reductions, supra at 10-14 (slip op. at ___), and as to the "manner in which to apply the rate reductions," N.J.S.A. 48:3-52(f), the Legislature has not specified the funding source for those reductions. However, as also pointed out by the Appellate Division, In re PSE&G, supra, 330 N.J. Super. at 114, N.J.S.A. 48:3-57(b)(3) provides that

> [t]he board may devise an alternative accounting or cost recovery process that permits an electric public utility to purchase power from a related competitive business segment of its public utility holding company, or otherwise, to provide basic generation service to its customers during the period that the electric public utility is providing for sustainable rate reductions . . ., if the board determines that such process is necessary to mitigate the impacts of market price fluctuations and to sustain such rate reductions.
>
> [N.J.S.A. 48:3-57(b)(3).]

Section 57(b)(3) is clear: the BPU has the power to authorize "alternative accounting" over the period when "sustainable rate reductions" are required. Most interesting, the language of the provision tells us that "sustainable" is being used, not in the temporal sense, but, rather, to mean "supportable," i.e., that alternative methods may be needed to adjust for market pricing "and to sustain [(support)] such rate reductions" during the three years reductions are in place. Id.

In effect, the practical result of allowing PSE&G to amortize its excess depreciation reserve is to soften the financial blow of the required reductions during the early phase-in period of deregulation.

Although the dissent and petitioners have their own view of how best to achieve "sustainable rate reductions," we are convinced that neither the law nor the facts in the record below permit the Court to second-guess the BPU's judgment. We hold that the BPU acted well within its discretion in allowing PSE&G to accelerate the amortization of its excess depreciation reserve.

C

Finally, our dissenting colleague contends that the record does not "support the BPU's generation asset valuation and stranded cost determination." Post at 19 (slip op. at __). On that basis, and because he believes that the BPU failed to hold "an adequate evidentiary hearing," the dissent would remand for a further hearing on that determination. Id.

The EDECA scheme has been succinctly described by the Appellate Division:

> Although [EDECA] does not mandate total divestiture, it allows utilities to functionally separate their generation assets and transfer them to an affiliate. N.J.S.A. 48:3-59. The utilities are permitted to recover stranded costs, the generation plant costs which the utility is at risk of losing when the supply market is opened to competition through a limited-duration (up to eight years) nonbypassable market transition charge (MTC). N.J.S.A. 48:3-61(a). . . . They are also permitted to impose a nonbypassable transition bond charge (TBC) (for up to fifteen years) in order to recover stranded costs. N.J.S.A. 48:3-62(a).
>
> [In re PSE&G, supra, 330 N.J. Super. at 90.]

The quantification of stranded costs therefore is directly affected by the market value of any generating assets transferred, in this case, to an affiliate. N.J.S.A. 48:3-61(e). Under N.J.S.A. 48:3-55(d), "the transfer of electric public utility assets . . . to a related competitive business segment of that electric public utility . . . shall be recorded at full value as determined by the Board." The statute requires maximization of the "market value of the generating asset," N.J.S.A. 48:3-61(f), in order to reduce the stranded costs to be recovered from ratepayers. Id. Once the BPU determines the total amount of recoverable stranded costs, it may authorize the securitization of those costs by the issuance of transition bonds and the imposition of a transition bond charge so that the utility can recover those costs. N.J.S.A. 48:3-62(a); N.J.S.A. 48:3-64(a). Ultimately, it is the question of the market value of the generating assets that concerns the dissent, precisely because of the impact of that value on ratepayer charges.

Following hearings before an Administrative Law Judge, the BPU commissioned an independent auditor to assist in the calculation of PSE&G's stranded costs. When settlement negotiations between the parties failed, PSE&G and seven other interveners[3] submitted a proposed stipulation of settlement to which the petitioners responded by submitting their own proposal for settlement. After considering those competing proposals and the parties' respective comments, on April 21, 1999 the BPU found PSE&G's stipulation more financially prudent and consistent with EDECA's requirements. In its Final Order, the BPU adopted the auditor's mid-range calculation of stranded costs, and then adjusted the amount downward to account for nitrogen oxide and sulfur dioxide emission credits.

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[3] Joining PSE&G's proposed stipulation of settlement were the New Jersey Transit Corporation, Tosco Refinery Company, New Jersey Commercial Users, Enron Energy Services, Independent Energy Producers of NJ, International Brotherhood of Electrical Workers Local 94 and National Resources Defense Council.

We are satisfied that the BPU's Final Order reflects findings that are supported by the record and are consistent with EDECA. Contrary to the dissent's assertion that the BPU should have considered "market-based valuations," post at 30 (slip op. at __), the Appellate Division again correctly observes that EDECA "does not specify what methodology should be used in determining the value of assets to be transferred to an affiliate." In re PSE&G, supra, 330 N.J. Super. at 124. During the administrative proceedings below, the ALJ used a "market price forecast" or "administrative" methodology to examine asset value. At the time, PSE&G had not proposed a transfer of its generation facilities to an affiliate and so the ALJ's income projection approach was developed "in the context of determining the amount of stranded costs PSE&G could recover for each of its generating plants." Id. In any case, the ALJ's methodology became the basis for the independent auditor's calculations. The auditor's report, in turn, contained three stranded costs calculations based on different inflation estimates: low, middle and high. The BPU accepted "as reasonable" the auditor's mid- range calculation.

The dissent, however, argues that the BPU's choice constitutes an utter failure "to provide . . . any explanation for" the agency's adoption of the auditor's mid-range stranded costs calculation. Post at 30 (slip op. at __). But common sense tells us that by selecting the mid-range figure, the BPU was simply applying its expertise to reject more extreme estimates in the face of uncertainty regarding inflation rates. In sum, the record demonstrates that the BPU's asset valuation is grounded in the ALJ's findings, albeit in a marginally different context, the independent auditor's report, and PSE&G's proposed stipulation of settlement. Further, the BPU's stranded costs determination involves complex valuation formulas and accounting concepts, which are exactly the type of decisions that our precedents instruct are best left to the agency's expertise. In re Kessler Mem'l Hosp., 78 N.J. 564, 576-77 (1979) (Handler, J., concurring) (stating that rate-setting decisions by the BPU require "judicial

deference to the discretion exercised by the agency experts"). We are therefore convinced that "there was substantial evidence in the record to support [the BPU's] findings on valuation." In re PSE&G, supra, 330 N.J. Super. at 128.

On the issue whether a remand is necessary, we are also convinced that the process undertaken by the BPU afforded ample opportunity to the parties to comment and present their cases. We disagree with our colleague's assertion that the BPU should have held a hearing "with respect to the [immediate] transfer of generation-related assets to [PSE&G's affiliate] GENCO", post at 30 (slip op. at __), because that transfer was anticipated as a possibility by the parties. As the Appellate Division noted, there was "testimony on alternatives: for example, a witness on behalf of [Independent Energy Producers of NJ] faulted PSE&G for separation of its generating facilities after, rather than at the beginning of, the transition period and a witness on behalf of the [Ratepayer Advocate] testified that complete divestiture was the best option." In re PSE&G, supra, 330 N.J. Super. at 112.

But even if we accept the dissent's contention that the BPU should have reopened the proceedings and permitted further testimony and cross-examination, post at 30 (slip op. at __), a reviewing court may set aside an order of the BPU only "when it clearly appears that there was no evidence before the board to support the same reasonably . . . ." N.J.S.A. 48:2-46. The Public Utilities Act also specifically prohibits courts from reversing a BPU decision for a mere "irregularity or informality in the proceedings of the board unless the irregularity or informality tends to defeat or impair the substantial right or interest of the appellant." Id.

The BPU's valuation of PSE&G's generation facilities and its stranded costs determination were based on years of fact-finding and extensive quasi-judicial and quasi-legislative proceedings. The parties participated fully and vigorously at all stages. We find no procedural infirmity that would compel us to remand at this juncture for additional hearings on those matters.

D

We note the dissent's concern that we abdicate our appellate responsibilities when we review the BPU's decision as an integrated whole in which the component parts are both interrelated and interdependent. Post at 5-6 (slip op. at __). That approach, the dissent fears, undercuts the function of the Court and inappropriately insulates the Final Order from review. Id.

The dissent's fears are unfounded. Our review suggests only that the separate aspects of the BPU decision should not be separately invalidated but, rather, the whole should fall if some component is infirm. However, we need not reach that question, because we do not find any single component of the Final Order to be infirm. Moreover, the BPU's understanding of its decision as an indivisible unit appropriately serves to inform our review as we examine both the discrete decisions and consider their relationship to the whole.

IV

We are not unmindful of the impacts of rate deregulation in California. The story of higher energy costs and energy shortages have appeared in newspaper headlines here in New Jersey, and our citizens are aware of the blackouts in California and their economic repercussions. Jennifer Coleman, Calif. faces more summer power woes, Star-Ledger, Apr. 22, 2001, at 43; H. Josef Herbert, Summer forecast: Blackouts in Calif. and higher gas prices, Star-Ledger, Mar. 16, 2001, at 21; David Ress, 'New Jersey's not California,' BPU chief assures senators, Star- Ledger, Feb. 8, 2001, at 26; Nigel Hunt, California's biggest utility in trouble, Star-Ledger, Jan. 11, 2001, at 6. Indeed, the cost and availability of energy have become a national issue. But we do not here rule on the wisdom of EDECA. Under our system of government, it is the other two branches -- the legislative and the executive -- that are entrusted with that authority and they have chosen their course. We find that the BPU has

properly exercised its discretion under EDECA in respect of PSE&G's filings.

The judgment of the Appellate Division is affirmed. The filing of this opinion constitutes entry of the Court's judgment.

CHIEF JUSTICE PORITZ and JUSTICES COLEMAN, LONG and VERNIERO join in the Court's opinion. JUSTICE STEIN filed a separate opinion, concurring in part and dissenting in part. JUSTICES LaVECCHIA and ZAZZALI did not participate.

SUPREME COURT OF NEW JERSEY
A-139/140/147 September Term 1999

IN THE MATTER OF PUBLIC SERVICE ELECTRIC AND GAS COMPANY'S RATE UNBUNDLING, STRANDED COSTS, AND RESTRUCTURING FILINGS

IN THE MATTER OF THE PETITION OF PUBLIC SERVICE ELECTRIC AND GAS COMPANY FOR A BONDABLE STRANDED COST RATE ORDER IN ACCORDANCE WITH CHAPTER 23 OF THE LAWS OF 1999, TO AUTHORIZE THE IMPOSITION OF A NONBYPASSABLE TRANSITION BOND CHARGE, TO AUTHORIZE THE SALE OF BONDABLE TRANSITION PROPERTY, THE ISSUANCE AND SALE OF NOT TO EXCEED $2.525 BILLION AGGREGATE PRINCIPAL AMOUNT OF TRANSITION BONDS BY A FINANCING ENTITY TO RECOVER PETITIONER'S BONDABLE STRANDED COSTS, AND THE APPLICATION OF TRANSITION BOND PROCEEDS TO RETIRE OUTSTANDING UTILITY DEBT, EQUITY OR BOTH, AND TO APPROVE THE FORMULA FOR THE CALCULATION AND ADJUSTMENT OF THE TRANSITION BOND CHARGE AND MARKET TRANSITION CHARGE-TAX RELATED THERETO.

STEIN, J., concurring in part and dissenting in part.

This complex appeal primarily concerns the validity of the final decision and Order, dated August 24, 1999 (Final Order), issued by the Board of Public Utilities (BPU), in respect of filings by Public Service Electric and Gas Company (PSE&G) that relate to rate unbundling, stranded costs and corporate restructuring. Also at issue is the validity of the BPU's September 17, 1999 Bondable Stranded Cost Rate Order (BSCRO), issued in response to PSE&G's petition to securitize its recovery-eligible stranded costs. The Final

Order was issued pursuant to, and was intended to implement, the provisions of the Electric Discount and Energy Competition Act (EDECA), N.J.S.A. 48:3-49 to -98. That statute, which took effect in February 1999, was enacted to authorize the BPU, to (1) "permit competition in the electric generation and gas marketplace" and "thereby reduce the aggregate energy rates currently paid by all New Jersey consumers;" (2)"[p]rovide for regulation of new market entrants in the areas of safe, adequate and proper service and customer protection;" (3) "[r]elieve electric public utilities from traditional utility rate regulation" for services provided in a competitive market; (4) provide electric public utilities "the opportunity to recover above-market power generation and supply costs . . . associated with the restructuring of the electric industry;" and (5) "[p]rovide [the BPU] with ongoing oversight and regulatory authority to monitor and review composition of the electric generation and retail power supply marketplace in New Jersey. . . ." N.J.S.A. 48:3- 50(c).

The PSE&G filings that were the subject of the Final Order were made in response to a report released by the BPU on April 30, 1997 entitled "Restructuring the Electric Power Industry in New Jersey: Findings and Recommendations." (Final Report). The Final Report recommended, in part, that by July 2000 all of the State's retail customers should be able to select their electric power supplier and that rate reductions of from five to ten percent should be implemented while retail competition was being phased in. The BPU's order adopting the Final Report mandated that the existing four utility monopolies, PSE&G, Jersey Central Power & Light Company (GPU), Rockland Electric Company (RECO), and Atlantic Electric Company (Atlantic), submit three filings to the BPU: a rate unbundling petition, a stranded cost petition, and a restructuring plan.

The rate unbundling petition was to address the manner in which the single, per-kilowatt-hour charge that appears on a customer's bill would be separated into its component parts, including generation, transmission and distribution – an

essential step because the Final Report contemplated that only the generation segment of the bill would be subject to competition. The stranded cost filings related to the utilities' right to recover after deregulation some portion of their overmarket (stranded) costs that would have been recovered in rate cases if they had continued as regulated monopolies. The issues in the stranded cost filings focused on entitlement to stranded cost recovery and quantification of stranded costs. The restructuring filings related to the reorganization of the four utilities to promote competition in electricity generation, focusing on the utilities' divestiture of generating assets and, if such assets were transferred to unregulated affiliates as in PSE&G's case, the valuation of such transferred assets.

Thus, the BPU's Final Order, applicable only to PSE&G as the first of the State's utility monopolies whose filing under EDECA has received final agency review, constitutes an agency determination of monumental significance in the process of restructuring and deregulating the sale of electric power in this State. An appeal from the Final Order was taken by the Division of the Ratepayer Advocate (RA), New Jersey Business Users (NJBUS), a group of large industrial and commercial customers, and Co-Steel Raritan, one of PSE&G's largest commercial customers. On appeal, the Appellate Division, in a thoughtful and comprehensive published opinion, affirmed the Final Order in all respects. In re PSE&G Co.'s Rate Unbundling, Stranded Costs and Restructuring Filings, 330 N.J. Super. 65 (App. Div. 2000). We granted the petitions for certification filed by the RA and NJBUS, and granted in part the petition for certification filed by Co-Steel limited to the issues concerning rate reduction. 165 N.J. 489 (2000).

At oral argument, and in supplemental post-argument briefs filed by the parties at the Court's request, the BPU, PSE&G, and various intervenors that supported the Final Order, argued that the Court should reject various discrete challenges to the Final Order advanced by petitioners, not only because those challenges were unmeritorious but, more

importantly, because the Final Order constituted the BPU's comprehensive and indivisible response to PSE&G's filings, and because invalidation of any discrete aspects of the Final Order would unbalance the BPU's carefully and comprehensively integrated determination, require offsetting modifications to the Final Order, delay rate reductions, and do harm to the public interest.

The Court, by order filed December 6, 2000, has affirmed the judgment of the Appellate Division. I write separately because in my view three aspects of the Final Order are seriously flawed. Moreover, I would reject the contention of respondents and some intervenors that reversal of discrete aspects of the Final Order is unsound because the Final Order must stand or fall as an integrated and indivisible unit. That approach would effectively insulate the BPU's Final Order from judicial review and partial invalidation on the premise that, even if aspects of the Final Order are contrary to law, the public interest is better served by preserving an integrated disposition with unlawful components than it would be by invalidating the unlawful components and requiring modification of the Final Order in conformity with applicable legal principles. The pragmatism that inspires the argument of the proponents of the Final Order must, in my view, yield to the constitutional authorization of judicial review of administrative agency determinations. N.J. Const., art. IV, § 5, ¶ 4. See Fischer v. Township of Bedminster, 5 N.J. 534, 538- 40 (1950). Clearly, our constitutional obligation of judicial review would be disserved and frustrated if we were to ignore illegal and invalid components of the Final Order for the purpose of preserving the claimed practical benefits of an integrated Final Order, notwithstanding its flaws.

I

The first issue on which I part company with the Court concerns the calculation of the statutorily-mandated rate reduction during the first thirty-six months following the

starting date for the implementation of retail choice pursuant to N.J.S.A. 48:3-53(a). EDECA mandates that each electric utility shall reduce its aggregate level of rates for each customer class by no less than five percent during such three-year period.

The BPU's Final Order permitted PSE&G to calculate that rate reduction from its 1999 rates, which included a 3.9% rate increase approved in April 1998. Petitioner's contend that the five percent rate reduction must be calculated from rates in effect on April 30, 1997, which would require an initial rate reduction of 8.9% from 1999 rates. NJBUS and the RA assert that the difference between their calculation of the initial rate reduction and the smaller rate reduction approved by the BPU's Final Order is between $250 and $300 million, but PSE&G contends that the difference involves approximately $160 million.

The analysis begins with the language of EDECA:

> d. (1) During a term to be fixed by the board, each electric public utility shall reduce its aggregate level of rates for each customer class, including any surcharges assessed pursuant to this act, by a percentage to be approved by the board, which shall be at least 10 percent relative to the aggregate level of bundled rates in effect as of April 30, 1997, subject to the provisions of paragraph (2) of this subsection.
>
> (2) The board may set a term for an electric public utility to phase in a rate reduction of ten percent or more during the first 36 months ~~after~~ the starting date for the implementation of retail choice as provided in subsection a. of section 5 of this act; provided, however, that, on the starting date for the implementation of retail choice as provided in subsection a. of section 5 of this act, each electric public utility shall reduce its aggregate level of rates for each customer class, including any surcharges assessed pursuant to this act, by no less than five percent.

[N.J.S.A. 48:3-52(d)
(emphasis added).]

The Board's Final Order acknowledges that because the statutory starting date for the implementation of retail choice is not later than August 1, 1999, see N.J.S.A. 48:3-53(a), EDECA mandates that "each electric public utility shall reduce its aggregate level of rates by at least 10% relative to the level of bundled rates in effect as of April 30, 1997." Final Report at 92. Because PSE&G had received in 1998 a 3.9% rate increase, the Board acknowledged that EDECA mandated that PSE&G reduce its current rates by 13.9% as of August 1, 2002. The BPU's Final Order noted further that the statute also mandated a five percent rate reduction commencing August 1, 1999, but the BPU's Order fails to state specifically whether under EDECA that reduction, like the ten percent reduction, must also be from the rate in effect on April 30, 1997, or whether the five percent reduction can be from current rates, which include the 1998 3.9% increase. Rather the BPU sidesteps the issue by making a finding that the rate reductions proposed in the Stipulation offered by PSE&G are adequate and, as that Stipulation reveals, the proposed five percent reduction is from current rates. In my view both the statute and its legislative history clearly indicate that the five percent reduction should be calculated from the rates in effect on April 30, 1997.

In view of the BPU's lead role in the drafting of EDECA, for the Board to fail to justify its strained construction of the statute it helped to draft, and resort instead to reliance on PSE&G's stipulation, simply strains credulity. Nevertheless, the Appellate Division sustained the BPU's determination, noting that "[c]ommon sense leads to the conclusion that the BPU's schedule of rate reductions is a reasonable interpretation of the statute." In re PSE&G, supra, 330 N.J. Super. at 103. That court also noted that under the BPU's Order the full 13.9% reduction must be in place by August 1, 2002, whereas the RA's reading of the statute would mandate an 8.9% reduction by August 1, 1999, with

the additional five percent reduction implemented over the next three years.

The RA and NJBUS argue persuasively that the BPU ignores overwhelming evidence demonstrating that its approval of PSE&G's formulation of the initial five percent rate reduction is contradicted by the BPU's own public positions on the issue. For example, the BPU's Final Report, issued April 30, 1997, contained this statement about the calculation of rate reductions:

> However, we believe that the introduction of a near term rate reduction on the order of 5-10%, concurrent with the unbundling of rates and the introduction of retail customer choice in conjunction with securitization, is an appropriate goal.
>
> In response to concerns that these targeted rate reductions may be eroded by subsequent upward rate adjustments between now and the date of retail competition, we emphasize that the targeted rate reductions must be in comparison to the current level of rates as of the date of his report.

[(Emphasis added).]

Moreover, when the BPU approved in April 1998 PSE&G's 3.9% Demand Side Management (DSM) increase, its own Order approving that increase confirmed that the increase would not erode rate reductions required by EDECA. That Order stated:

> The Board notes its intent that regardless of the ultimate allocation of costs to the various rate components, rate reductions will be calculated based on a comparison of the aggregate level of bundled rates in effect in April 1997 to the new aggregate level of rates.

> [I/M/O the Motion of Public Service Electric and Gas Company to Increase the Level of the Electric Demand Side Adjustment Factor, BPU Docket No. ER 97-020101, (April 1, 1998) at 12-13.]

I also note that when the RA appealed to the Appellate Division the BPU's Order granting PSE&G its 3.9% rate increase, the BPU's Appellate Division brief asserted on page 17: "The Board's approval of this single item rate increase is not to affect its requirement that, as part of restructuring, PSE&G's 5% to 10% rate reduction will be in comparison to its April 30, 1997 rates, that is, prior to the demand side adjustment factor increase."

I also believe the statute is crystal clear. Section d(1) of N.J.S.A. 48:3-52 requires a ten percent rate reduction by August 1, 2002 from rates as of April 30, 1997. Section d(2) modifies d(1) to permit the ten percent rate reduction to be phased in over three years from August 1, 1999, provided that a five percent rate reduction is implemented immediately. That reading of the statute is confirmed by the Assembly and State Legislative Fiscal Estimate that states: "These estimates assume that the rate discount is applied to the total electric rate using April of 1997 as the basic date."

PSE&G contends that if the Court were to order a retroactive rate adjustment, the BPU would be obligated to consider reducing the shopping credit and restructuring PSE&G's stranded cost recovery. I find no support in EDECA for the contention that shopping credits, stranded cost recovery, and the statutorily mandated rate reduction necessarily are interdependent. Moreover, by urging the BPU to adopt Stipulation I that provided that the initial five percent rate reduction was from current rates, PSE&G clearly understood and assumed the risk that a reviewing court would reject that interpretation of the statute.

Because the BPU's Final Order unlawfully allows PSE&G to implement the initial mandatory five percent

reduction from current rates, rather than from the rates in effect on April 30, 1997, I would remand the matter to the BPU to order a retroactive adjustment of PSE&G's initial rate reduction to conform to the clear requirements of EDECA.

II

I also disagree strongly with the Court's affirmance of the Appellate Division's determination, In re PSE&G, supra, 330 N.J. Super. at 138, that the BPU's approval in the Final Order of the accelerated amortization over forty-three months of PSE&G's excess depreciation reserve fund "was within its discretion and did not violate the Act."

PSE&G's $568.7 million-dollar excess-depreciation reserve fund resulted directly from PSE&G's proposal to the BPU, at the outset of the stranded cost proceedings, to change the average life used to establish depreciation rates for PSE&G's distribution plant investment from twenty-eight years to forty- five years.

That proposal was supported by the testimony of Robert C. Krueger, Jr., Director-Tax Services of PSE&G, who justified the change solely on the basis that a forty-five year life for the distribution plant was consistent with data presented in PSE&G's last depreciation rate proceeding. Mr. Krueger explained that by lengthening the useful life of PSE&G's distribution plant assets from twenty-eight to forty-five years, a substantial excess depreciation reserve would accrue on PSE&G's balance sheet to account for the fact that its distribution plant assets had been depreciated too quickly (over twenty-eight rather than forty-five years). In his testimony Mr. Krueger estimated the amount of that reserve to be $433 million dollars as of December 31, 1996.

Mr. Krueger also testified that

> [t]here are two ways to address this over accrual. The first is to utilize it in the calculation of the new depreciation rate which would reduce the rate for the remaining [useful life of the plant assets]. The

> second would be to amortize it over a shorter period of time maintaining the depreciation rate at a higher level.

Krueger proposed to the BPU that the excess depreciation reserve be amortized over seven years.

In its Final Order, however, the BPU approved the proposal in PSE&G's stipulation to amortize the $568.7 million excess depreciation reserve over three years and seven months, beginning January 1, 2000 and ending July 31, 2003. The BPU established amortization amounts of $125 million dollars in years 2000 and 2001, $135 million in 2002, and $183.7 in 2003, and acknowledged in the Final Order that those amortization amounts were to be used by PSE&G to partially fund its rate reductions and stranded cost recovery. PSE&G acknowledges that the amortization amounts would be recorded by PSE&G as credits against expenses (cost-reductions), resulting in increased income available to PSE&G during the transition period to absorb a substantial portion of the impact of the rate reductions mandated by EDECA. In fact, NJBUS asserts that of the $1.294 billion rate reduction ordered by the BPU, approximately forty-four percent would be funded by the excess-depreciation reserve fund created by excess depreciation charges previously imposed on ratepayers. PSE&G responds that, giving effect to related tax liabilities and other factors, the actual amount of the depreciation reserve available for rate reductions or stranded cost recovery is $380 million.

Petitioners contend that the overly-generous amortization of PSE&G's excess depreciation reserve has the effect of creating an available source of funds, generated by excess depreciation charges to ratepayers over prior years, that PSE&G can use to finance the rate reductions that the Legislature contemplated would result in a reduction of the company's profits. Petitioners rely on section 4 of EDECA, N.J.S.A. 48:3-52(f), that provides:

> f. The board shall determine, consistent with the provisions of this act, the manner in which to apply the rate reductions established pursuant to subsections d. and e. of this section among some or all of the unbundled rate components, including the distribution and transmission charges and market transition charges, in order to provide for a sustainable aggregate rate reduction for customers and to encourage a competitive retail supply marketplace.

Petitioners argue that that subsection of EDECA specifically contemplates not only that the rate reduction shall be allocated among PSE&G's distribution, transmission and market transition changes, but that the Act's reference to "a sustainable aggregate rate reduction for customers" clearly is inconsistent with the BPU's decision to allow PSE&G to fund a substantial portion of the statutory rate reduction with a one-time, non- recurring excess depreciation reserve fund.

Moreover, petitioners note that pursuant to sections 13 and 14 of EDECA, N.J.S.A. 48:3-61 and-62, electric utilities are authorized to recover that portion of their stranded costs not securitized by the issuance of transition bonds by imposing a market transition charge on all customers for a term not to exceed eight years. However, petitioners rely specifically on N.J.S.A. 48:3-61(h) which provides that "the board shall not determine a level for the market transition charge for recovery of a utility's eligible stranded costs . . .which prevents the achievement of the rate reductions required pursuant to section 4 of this act . . . ." According to petitioner, that provision of EDECA contemplates that a utility unable to fund the required rate reductions by reducing distribution or transmission charges must fund the rate reductions by reducing the market transition charge, subject to the statute's qualifying language that the rate reductions neither impair the utility's "financial integrity" or its "access to the capital markets." N.J.S.A. 48:3-61(h). In short, petitioner's argue that the BPU's authorization of an unusually brief amortization

period for the excess depreciation reserve fund was a windfall that permitted PSE&G to achieve the required rate reductions without reducing either its distribution and transmission charges or its market transition charge.

At oral argument, counsel for PSE&G acknowledged, as did PSE&G's Tax Manager in testimony before the BPU, that the BPU could have required PSE&G to reduce future depreciation charges to ratepayers by amortizing the excess depreciation reserve fund over the remaining useful life of the relevant assets. We requested supplemental briefing on the manner in which, absent restructuring, the reserve fund would have been amortized in accordance with generally accepted accounting principles. Neither PSE&G's nor the BPU's response was reassuring or informative. PSE&G cited generally to the Statement of Financial Accounting Standard No. 71 for the proposition that regulatory agencies have the authority to amortize so-called regulatory liabilities on an accelerated basis, but without providing any relevant or persuasive support for the BPU's decision to amortize the $568.7 excess depreciation reserve fund over forty-three months. The BPU similarly cited to the Statement of Financial Accounting Standards No. 71, and specifically cited In re the Petition of Jersey Ctr. Power and Light Co., 85 N.J. 520, 528 (1981) as authority for the accelerated amortization period that it sanctioned. That case clearly is inapposite, involving as it did the BPU's emergency acceleration of the amortization of Jersey Central Power and Light Company's (JCP&L) deferred energy balance to produce additional revenues that precisely equaled the loss in revenue caused by the removal of Three Mile Island-Unit 1 from JCP&L's rate base, our Court noting the BPU's concern about the utility's possible insolvency. Id. at 527-28. The BPU's brief also acknowledged that an alternative disposition would have been to amortize the reserve fund over the useful life of the plant assets.

NJBUS agreed with the statement of PSE&G's counsel at oral argument that the excess depreciation reserve fund should have been amortized over the useful life of the

distribution plant assets to reduce future depreciation charges. The RA concurred, stating that, absent restructuring, the excess depreciation reserve fund should have been returned to customers through lower depreciation rates over the remaining life of the plant assets.

Based on the respective representations of PSE&G's Tax Manager and its counsel to the BPU and to this Court, and the insubstantial support for the BPU's accelerated amortization schedule provided by the supplemental briefing we requested, I have no confidence in the validity of the accelerated amortization ordered by the BPU nor in its authority to order it. The Final Order itself is conclusory, and reflects no insight or appreciation by the BPU that to permit PSE&G to amortize this excess depreciation reserve fund over forty-three months — almost twice as fast as PSE&G requested — might very well violate the letter and spirit of EDECA, create a windfall for PSE&G, and undermine public confidence in the fairness of the Final Order. For those reasons, I would reverse that portion of the Appellate Division judgment that approved the BPU's accelerated amortization of the excess depreciation reserve fund and remand that issue to the BPU for reconsideration on the record below.

III

Finally, I fully agree with petitioners' contentions that the lack of an adequate evidentiary hearing concerning the value attributable to PSE&G's stranded assets denied due process to petitioners, and that the evidence in the record was insufficient to support the BPU's generation asset valuation and stranded cost determination.

The RA characterizes the economic impact of the BPU's arbitrary stranded cost determination and generation asset valuation as the single most significant issue in this appeal. EDECA generally defines stranded costs as "the amount by which the net cost of an electric public utility's electric generating assets . . . exceeds the market value of those assets . . . ." N.J.S.A. 48:3-51. The statute requires the BPU to determine the

amount of stranded costs eligible to be recovered by a utility, N.J.S.A. 48:3-61(c), and authorize the issuance of transition bonds to securitize up to seventy-five percent of such recoverable stranded costs. N.J.S.A. 48:3-62(c)(1). A transition bond charge may be imposed by the utility on its customers over a fifteen-year amortization period to cover principal and interest charges on such bonds. N.J.S.A. 48:3-62(d)(1). Because the BPU determined PSE&G's stranded costs to be $2.94 billion, with $2.4 billion of such costs approved for securitization, the RA contends that PSE&G's customers will be saddled with an overstated and excessive stranded cost surcharge over the next fifteen years.

The crux of the procedural due process issue derives from the fact that when PSE&G, in July 1997, submitted a filing containing its rate unbundling, stranded costs and restructuring proposals, its filing contemplated that PSE&G would remain in the electric generation business during the then proposed seven-year transition period, and then transfer its generation assets to an affiliate of its holding company at the end of that seven- year period. That restructuring proposal contrasted with those of the other three utility companies that contemplated immediate divestiture of generating assets through sales to unaffiliated entities. Accordingly, the extensive hearings on the unbundling and stranded cost filings before the Office of Administrative Law in February and March 1998, and the similarly extensive hearings before BPU Commissioner Armenti on the restructuring filing in April and May 1998, as well as the extensive prefiled witness testimony and the parties briefs, all contemplated the retention by PSE&G of its generating assets for a seven-year transition period.

In March of 1999, approximately ten months after the hearings were completed and seven months after the ALJ's initial decision on the rate unbundling and stranded cost filings, PSE&G and seven other parties submitted a proposed stipulation of settlement (Stipulation I) that, for the first time, proposed the immediate transfer of PSE&G's generating

facilities to GENCO, an unregulated affiliate of PSE&G. Immediately prior to the filing of Stipulation I, a motion, supported by petitioners, was made to reopen the record in the unbundling and stranded cost proceedings, but the BPU denied the motion.

The BPU's stranded cost determination was a direct result of its finding that the market value of PSE&G's generation assets to be transferred to GENCO was $1.903 billion. EDECA mandates that a utility's transfer of assets to an affiliate must be at "full value," N.J.S.A. 48:3-55(d), defined more precisely by EDECA as "full market value." N.J.S.A. 48:3-61(e). In the stranded cost proceeding before the OAL, the Administrative Law Judge (ALJ) did not determine either the value of PSE&G's generating assets (because at that time PSE&G intended to retain such assets for seven years), or the amount of PSE&G's stranded costs. But based on the evidence in the record, the ALJ in his decision provided an "administrative estimate" concerning the method for fixing the market value of generating assets, which in turn would lead to a determination of stranded costs. That methodology did not rely on comparable sales of generating assets, but rather contemplated a valuation based on the estimated earnings to be derived from those assets. He stated:

> Absent divestiture, an administrative determination must be made to arrive at a quantification of stranded costs. The Company's methodology, which was broadly followed by all intervenors in their studies, was premised on the fact that market value can be estimated administratively by utilizing a market price forecast. The forecasted market energy price and capacity price, applied to the forecasted output of particular generating assets, is used to derive a projected market revenue of each facility

> on an annual basis. Forecasted annual cash expenditures including fuel, operation and maintenance (O & M) expenses, capital additions, taxes, administrative and general expenses and other ancillary costs are then subtracted from the projected annual market revenues. A comparable analysis is performed for each generating facility, as well as for each power purchase agreement with NUG contractors. The net results are discounted back to the present value using a discount rate of 8.42 percent, this value being based upon the Company's 1992 cost of capital, using the Company's capital structure provided in the last base rate case.

Notwithstanding the methodology proposed by the ALJ for calculating stranded costs, the ALJ found it to be "impossible to determine a specific stranded cost amount for the Board's consideration" and recommended that the parties confer on the issue. The parties did confer in September 1998 but could not resolve the issue. The BPU then retained ICF Resources Incorporated (ICF Resources or ICF), an independent consulting firm, to render a report to the BPU recommending a stranded cost valuation. See In re PSE&G, supra, 330 N.J. Super. at 114-15.

Before reviewing the ICF Resources report on which the BPU based its stranded cost evaluation, I note the RA's contention that the BPU's evaluation substantially exceeds all of the stranded cost estimates submitted by parties before the ALJ, including the estimate by the Board's then consultant. The RA's expert estimated PSE&G's generation-related stranded costs at $1.9 billion. Enron Corporation, an active litigant before the ALJ, estimated stranded costs at $2.3

billion. ICF Kaiser[1], a consultant for the BPU during the ALJ proceeding, calculated that its best estimate of PSE&G's generation-related stranded costs to be $2.1 billion, with "moderate mitigation," a figure that the consultant characterized as "less than 54 percent of the PSE&G filed estimate."

The ICF Resources report, requested by the BPU in September 1998, was submitted in early November 1998 and contained three different stranded cost calculations based on different inflation rates: $2.485 billion; $2.949 billion; and $3.310 billion. Shortly after its receipt, the Attorney General's office forwarded that ICF report to all parties "for your information," with the explanation that the calculation of stranded costs in the report represented ICF's "best interpretation and quantification of the ALJ's Initial Decision" but noting that the "quantification does not necessarily represent the position of the BPU staff." No responses to the ICF report were requested by the Attorney General's office or by the BPU, and none were received. Id. at 115-16. Significantly, the author of that report never testified in support of the report's findings before the BPU or an ALJ, and was never subject to cross-examination. More than nine months later, in its Final Report, the BPU adopted, without any explanation, ICF's "middle" quantification of stranded costs. The Board's order simply states:

> While no consensus was reached among the parties, after the meeting, by letter dated November 18, 1998, the Auditors submitted to the Board a proposed quantification of the ALJ's stranded cost recommendations, reflecting a range of values based on three scenarios, from a low end of $2.485 billion, to a mid-range of $2.949 billion, to a high

---

[1] The record is silent on whether ICF Kaiser, the BPU's consultant before the ALJ, is the same entity as ICF Resources Incorporated, the firm that submitted the November 8, 1998 report on which the BPU eventually relied.

> end of $3.310 billion. We HEREBY ACCEPT as reasonable, with one minor modification discussed below, the Auditors' mid-range quantification of the ALJ's decision with respect to PSE&G's net-of-tax owned generation stranded costs of $2.949 billion and, based on that quantification, HEREBY ADOPT the ALJ's ID [Internal Decision].

The BPU slightly adjusted downward ICF's mid-range figure from $2.949 billion to $2.94 billion, to account for nitrogen oxide and sulfur dioxide emission credits, but without any explanation for its valuation of those credits.

Several of the arguments advanced by the RA and NJBUS persuade me that the BPU's valuation of PSE&G's generation-related stranded costs was procedurally flawed, and that the record should be reopened, as petitioners contend, for introduction of evidence of current valuations of generation-related assets based on actual sales as well as to permit direct-and cross-examination of the author of the ICF report.

The RA observes that EDECA mandates notice and a hearing on the elements of a utility's restructuring plan. N.J.S.A. 48:3- 53(b) provides in part:

> The board shall have the authority to require each electric public utility to submit a restructuring filing, with elements deemed necessary by the board, which shall include the mechanisms by which it will comply with the schedule for implementation of retail choice established pursuant to subsection a. of this section and with the other provisions of this act. Such filing shall be reviewed and, after notice and hearing, may be approved, rejected or modified by the board . . . .
>
> [(Emphasis added).]

Because PSE&G's proposal to transfer its generation-related assets to GENCO was first announced in Stipulation I in March 1999, that crucial aspect of PSE&G's restructuring plan was never the subject of a public hearing, with live testimony, contrary to the mandate of EDECA.

In addition, NJBUS observes that the entire context of the stranded costs valuation proceeding before the ALJ was skewed because the participants then understood that PSE&G intended to retain ownership of its generation-related stranded assets for seven years. As NJBUS notes, EDECA mandates that the BPU periodically review the market value of retained assets, and if necessary reduce market transition charges, to ensure that a utility does not receive reimbursement from customers in excess of actual stranded costs. N.J.S.A. 48:3-61(f) and (g) provide in part:

> f. For the purposes of quantifying the magnitude of stranded costs eligible for recovery via the market transition charge, the board shall require or impute all reasonably available measures for the electric public utility to mitigate the quantity of stranded costs, by:
>
> (1) Reducing the cost of power purchase commitments and the on-going capital and operations costs of the generating plant;
>
> (2) Maximizing the market value of the generating asset or purchase commitment; or
>
> (3) Undertaking other reasonably achievable cost reductions.
>
> g. The board shall conduct a periodic review and, if necessary, adjust the market transition charge or implement other ratemaking mechanisms in order to ensure that the utility will not collect charges that exceed its actual stranded costs.
>
> [(Emphasis added).]

That principle was acknowledged in the testimony of PSE&G's President during the restructuring hearing in May 1998 when he stated that if the generation-related assets appreciated in value during the seven-year period "that money would be used probably first to reduce stranded assets while we had a balance" and then "it would go to the bottom line." However, after the assets are transferred to GENCO, an unregulated affiliate of PSE&G, no "true-up" of value is authorized or contemplated by EDECA and the stranded cost valuation becomes fixed, as do the related customer charges for recovery of stranded costs. Thus, the actual significance of the stranded cost proceeding before the ALJ was not revealed to or appreciated by the parties until months after the hearing had ended, when PSE&G disclosed its intent to transfer its generation-related assets to GENCO.

Petitioners argue persuasively that the BPU's reliance on an ALJ's administrative estimate of the value of the generation- related assets, and its rejection of the request of petitioners to provide current market-based evidence of valuation, resulted in a flawed administrative proceeding and a result not supported by substantial evidence in the record. That contention is fortified by the BPU's failure to provide any rationale for its selection of ICF's mid-range valuation for PSE&G's assets, and the lack of any opportunity for petitioners or other parties to cross-examine the author of the ICF report or offer rebuttal evidence.

A fundamental principle of administrative law is that agency decisions not only must be based on substantial evidence in the record but also must adequately be explained so that courts are able to discharge their responsibility of judicial review. This Court fully supports that basic principle:

> The courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review. The orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be "clearly disclosed and adequately

> sustained." "The administrative process will best be vindicated by clarity in its exercise"; judicial review demands that there be "clear indication" that the administrative authority "has exercised the discretion" with which it has been endowed. It is in this wise that conformance to the statutory standard of conduct can be secured.
>
> [In re Plainfield-Union Water Co., 11 N.J. 382, 396 (1953)(citations omitted).]

See also In re the Issuance of a Permit By the Dep't of Environmental Protection to Ciba-Geigy Corp., 120 N.J. 164, 180 (1990) ("The findings should be adequately supported by the record and carefully explained.").

Our cases emphasize that when a reviewing court undertakes to consider whether an agency determination is supported by "sufficient credible evidence present in the record," Close v. Kordulak Bros., 44 N.J. 589, 599 (1965), the

> application of this standard requires far more than a perfunctory review; it calls for careful and principled consideration of the agency record and findings. The administrative agency must set forth basic findings of fact supported by the evidence and supporting the ultimate conclusions and final determination so that the parties and any reviewing tribunal will know the basis on which the final decision was reached.
>
> [Riverside Gen. Hosp. v. New Jersey Hosp. Rate Setting Comm'n., 98 N.J. 458, 468 (1985) (citations omitted).]

Thus, in Public Service Coordinated Transport v. State, 5 N.J. 196 (1950), this Court set aside a transportation fare rate-increase from five cents to seven cents granted by the Board of Public Utility Commissioners as arbitrary and unreasonable because it was not supported by adequate evidence in the record. We stated:

> We are not unaware of the provisions of R.S. 48:2-32, to the effect that the Board is not bound by the technical rules of evidence and is thereby permitted, as indeed are all administrative agencies, to consider matters which might not be admissible in a court of law, without it constituting error. Nevertheless, there must still be sufficient competent evidence in the record to support the reasonableness of the rates arrived at, since a court is of necessity restricted upon a review of the rates fixed by the Board to a consideration of the record before it. If this were not so, the right of an interested party to a review of the Board's determinations would be a meaningless formality, for the decision of the appellate tribunal under such circumstances would be the result of but guesswork or caprice.
>
> [Id. at 223.]

In my view, those fundamental principles of administrative law should control the disposition of this issue. Not only was the restructuring hearing mandated by EDECA never held with respect to the transfer of generation-related assets to GENCO, but also the stranded costs hearing before the ALJ was based on the ultimately incorrect premise that PSE&G would retain its generation assets for seven years. Rather than reopen the hearing as requested, and achieve compliance with the letter and spirit of EDECA, the BPU based its stranded cost calculation on stale evidence before the ALJ focused on income projections but omitting any proof of market-based valuations, and relied heavily on the ICF report that never had been subjected to cross-examination or rebuttal. In addition, the BPU utterly failed to provide in its Final Order any explanation for selecting ICF's mid-range figure as the basis for valuing PSE&G's stranded costs. Most disturbing is the fact that the BPU's flawed stranded cost valuation, because of its substantial economic impact on customers over the next fifteen years, in all likelihood was the

most significant of all of the factual findings in the Final Report.

Finally, notwithstanding the provisions of the basic generation service contract with GENCO that guaranteed fixed electric generation prices for three years, without adjustment for fuel cost increases, a remand on the stranded costs issue need not disturb the critical provisions of that contract. Obviously, any increase in the value of the generation-related assets transferred to GENCO would have to be reflected in the generation service contract, but the remaining provisions and basic price structure set forth in the contract need not be affected. I have little doubt about the BPU's ability to fashion a remedy for the procedural shortcoming of its stranded cost evaluation process that simultaneously protects the basic interests of PSE&G customers.

IV

One need only read newspaper accounts concerning the current increases in electricity generation costs experienced by utilities in California following that state's initiation of rate deregulation, and the resultant increases in consumer costs, to appreciate the significance and the potential implications of the BPU's exercise of its authority over electric utility deregulation and restructuring. Although deference to the agency's fact-findings and administrative expertise is appropriate, unlawful components of the Final Order that contradict the legislative mandate cannot be permitted to stand merely because their invalidation might alter the balance that the BPU's disposition sought to achieve.

Except for the three grounds on which I would reverse the judgment of the Appellate Division and remand the matter to the BPU, I join in the Court's disposition of this appeal.

SUPREME COURT OF NEW JERSEY

NO. A-139/140/147 SEPTEMBER TERM 1999

ON APPEAL FROM _____

ON CERTIFICATION TO Appellate Division, Superior Court

IN THE MATTER OF PUBLIC
SERVICE ELECTRIC AND GAS
COMPANY'S RATE UNBUNDLING,
STRANDED COSTS AND
RESTRUCTURING FILINGS.

DECIDED May 18, 2001
Chief Justice Poritz PRESIDING
OPINION BY Per Curiam
CONCURRING/DISSENTING OPINION BY Justice Stein

CHECKLIST	AFFIRM	CONCUR IN PART/DISSENT IN PART	
CHIEF JUSTICE PORITZ	X		
JUSTICE STEIN		X	
JUSTICE COLEMAN	X		
JUSTICE LONG	X		
JUSTICE VERNIERO	X		
JUSTICE LaVECCHIA	----------	----------	---
JUSTICE ZAZZALI	----------	----------	---
TOTALS	4	1	

Supreme Court, U.S.
FILED
JUL 6 2001
CLERK

No. 00-1393

IN THE

Supreme Court of the United States

CO-STEEL RARITAN,

Petitioner,

v.

NEW JERSEY BOARD OF PUBLIC UTILITIES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION OF RESPONDENT PUBLIC SERVICE ELECTRIC AND GAS COMPANY

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether a party's contractual rights have been impaired under the Contracts Clause by administrative agency action that ensures that the party: (a) continues to receive the economic benefit of its bargain throughout the contract term; and (b) enjoys the benefits of the introduction of competition in retail electricity markets, while sharing with all ratepayers the costs of that industry restructuring, both during and after the contract term?

2. Whether the Equal Protection Clause is implicated by administrative agency action to enforce the terms of a private contract, in furtherance of a legitimate governmental objective to place greater reliance on competitive markets for energy, and resulting in treatment of ratepayers that does not involve any suspect or quasi-suspect classification or impair any fundamental rights?

3. Whether the Due Process Clause is implicated by the decision of an administrative agency that was fully explained and based on a record developed in administrative proceedings in which all parties had full notice of what the agency sought to accomplish and ample opportunity to place their positions on the record, including the opportunity to take part in extensive live hearings, confront adverse witnesses, and submit voluminous written comments at all stages of the proceeding?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Public Service Electric and Gas Company, is a wholly-owned subsidiary of Public Service Enterprise Group Incorporated, which is publicly traded.

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C. In light of the Board's reliance on extensive hearings conducted with the on-going development and passage of the Act, in which all parties were afforded notice and an opportunity to be heard in respect of all issues, this case does not pose any question about the limits that the Federal Constitution may place on the procedures followed by state administrative agencies. 24

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COUNTERSTATEMENT OF THE CASE

The Petition for a Writ of Certiorari ("Petition") of Co-Steel Raritan ("Co-Steel" or "Petitioner") presents only issues of state law and policy without raising any genuine federal constitutional issue or compelling federal question, and, therefore, should be denied. While restructuring the electric utility business of Public Service Electric and Gas Company ("Public Service" or the "Company"), the New Jersey Board of Public Utilities ("Board") has at all times respected Co-Steel's contract with Public Service, and ensured that Co-Steel enjoys the benefits of the introduction of competition in New Jersey's retail electricity markets while bearing a share of the costs.

The Petition presents no valid grounds for this Court's review. First, Co-Steel's contract has not been impaired; rather, Co-Steel is receiving the full economic benefit of its bargain during the contract term. Second, the Equal Protection clause is not implicated. The challenged agency action is in furtherance of a legitimate governmental objective, and is predicated on the reasonable interpretation of a state statute by the administrative agency charged with its implementation. Any differential treatment alleged is based on a rational relation between the challenged classification and the legitimate objective furthered, and does not involve any suspect or quasi-suspect classification or impair any fundamental right. Finally, due process has been fully accorded. The determination by the Board of the value of the assets to be transferred to an independent unregulated affiliate of Public Service was based on substantial credible evidence in the record, adduced in the course of exhaustive and open proceedings in which Co-Steel actively participated.

By way of response to the Petitioner's Statement of the Case, this counterstatement presents the regulatory context in which Co-Steel entered into its power purchase contract, and summarizes the proceedings that Co-Steel alleges impermissibly

impaired that contract (point A).[1] The counterstatement then addresses the facts and procedural history that bear on the "procedural irregularities" alleged by Co-Steel (point B), and the basis of the Board's decision, which is clearly articulated in its Final Order (point C).

A. Regulatory context and the proceedings before the Board.

Paralleling developments in federal policymaking and in other states supporting the introduction of competition in wholesale and retail electric power markets, the New Jersey Energy Master Plan Committee ("Committee"), led by the Governor and the president of the Board, developed a formal policy framework, issued in March 1995, for the transition to competitive power markets. Accepting the Committee's recommendations, the Legislature enacted a statute in July 1995 that expressly authorized electric utilities to enter into "off-tariff" or discounted rate agreements with business customers in order to induce them to remain in New Jersey. App., 22a. Thus, at the time that Co-Steel's special contract became effective in November 1995 (App., 379a, 425a), all stakeholders in New Jersey were well aware of the move toward competitive markets; indeed, Co-Steel's market-based, discounted contract was itself reflective of and entirely consistent with this movement.

Moreover, beginning in June 1995 the Board embarked on what became a two-year effort to investigate and develop a long-term policy for implementing a competitive marketplace for electricity. The Board solicited and received input from all stakeholders and interest groups, including New Jersey's electric utilities, consumer groups, environmental interests, energy

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1. This history is also outlined in the comprehensive decision of the Appellate Division of the Superior Court of New Jersey ("Appellate Division"), which unanimously affirmed the Board decisions that are challenged here. *See* Appendix to the Petition ("App."), 20a-29a.

service companies, independent (non-utility) power producers and marketers, all classes of customers, labor interests, local government, and the New Jersey Division of the Ratepayer Advocate ("RPA"). App., 22a-23a. The outcome of this effort was a final report, dated April 30, 1997, entitled "Restructuring the Electric Power Industry in New Jersey: Findings and Recommendations" (the "Final Report"). In the Final Report the Board recommended that by October 1998, all retail electricity customers in New Jersey should have the ability to choose their own electric generation supplier in a competitive retail market. The Final Report also recommended that electric utilities provide rate reductions of up to 10% while retail competition was phased in.

Consistent with the objectives of the Final Report, the Board directed each of New Jersey's electric utilities to submit detailed filings, including a "restructuring" plan and a "stranded cost" petition. App., 24a. The restructuring plan to be filed by each utility involved, among other things, the separation of generation from regulated utility operations and the reliability of generation supply.[2] The stranded cost petition addressed the financial integrity of the utility and recoupment of its investment. It was required because under the original regulated system, each utility was required to supply electric generation to all retail customers in its service area. Each utility therefore had to make the substantial investments in generation assets and incur the operating risks necessary to provide safe and adequate service. The Final Report recognized that by virtue of the State's

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2. In the Final Report the Board noted that development of a fully competitive marketplace could be "best accomplished through the establishment of a separate, affiliated generation Company." Appendix to the Initial Brief of Appellant RPA to the Appellate Division ("RPA App."), 379a. The Board therefore specifically directed that in their restructuring plans each utility provide for the formation of a separate affiliated generation company or demonstrate that a separate entity would not be necessary. *Id.*, 422a-423a.

fundamental change in policy — which was unanticipated when utilities originally made these investments — certain of the utilities' generation assets would be rendered uneconomic or "stranded." A singular purpose of the "stranded cost" proceeding was to establish the market value (against book value) of the company's separate generation facilities as a basis for determining the utility's stranded costs.[3]

On July 15, 1997, Public Service submitted its proposals. The Board transferred the stranded cost filing to the Office of Administrative Law ("OAL") for hearings and initial determinations, while retaining the restructuring portion of the petition, including the separation of generation from regulated utility operations. The Administrative Law Judge ("ALJ") and the Board granted intervenor and participant status to numerous individual parties and interest groups representing the diverse concerns of utilities, energy suppliers, labor, environmental groups, and customers, including Co-Steel. *See* Petition at ii.

Over the second half of 1997 and into the first part of 1998, the parties submitted the testimony of numerous witnesses and engaged in extensive discovery in the respective restructuring and stranded costs proceedings (collectively, the "Proceedings") before the Board and the ALJ.[4] With regard to plant valuation, all parties, including the independent auditors selected by the Board ("Auditors") (App., 24a-25a) relied on a "discounted cash flow" or "DCF" analysis. Applying that methodology, the parties' experts proffered estimates of the market value of the Company's generation plants. Those estimates varied, due to the use of different "input" factors impacting the potential

3. In its filing the Company calculated its stranded generation assets at $3.9 billion, which the Board ultimately reduced by approximately $1 billion.

4. The history of the Proceedings is summarized in detail in the Board's August 24, 1999 Final Decision and Order ("Final Order") (App., 176a-180a) and in the decision of the Appellate Division affirming that Order (App., 24a-26a).

revenues to be generated by and/or costs incurred to operate the individual plants.[5] Another issue, apart from the valuation of the generation assets, related to the operational separation of those assets. Public Service proposed to retain its generation assets throughout an initial "transition period," and to then transfer them to a separate entity "as recommended in the [Final Report]."[6] In response to that proposal, several parties adverse to Public Service proposed a transfer *at the outset of competition* to assure prompt separation of generation from transmission and distribution.[7]

Forty days of evidentiary hearings were conducted by the OAL and the Board from February through May 1998, in which dozens of witnesses sponsored by the various parties in interest — including the Auditors — were subject to cross-examination.[8] In a comprehensive Initial Decision, the ALJ resolved the

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5. The DCF methodology as applied to utility property involves the determination of market value by estimating what a potential buyer would be willing to pay for a specific generating plant, based on an analysis of the revenues to be produced by that plant over its useful life, less total costs over the same time period. The net present value of the results represents the asset's market value. *See* App. 65a-66a, 186a-187a.

6. Appendix to the Initial Brief of Appellant New Jersey Business Users to the Appellate Division, 647a. *See also* transcript of the stranded cost proceeding, T87-88, 99-101.

7. *See* Transcript of the restructuring proceeding, T2887-90; Appendix to Public Service's Brief to the Appellate Division ("PS App."), PSa1404-07; Appendix to Public Service's Supplemental Brief to the Supreme Court of New Jersey, PSSsa81-87.

8. The cross examination of representatives of the Auditors on plant valuation/stranded cost issues can be found in the transcript of the stranded cost proceeding before the OAL, T3222-3524, T3629-3779, T3788-3966.

numerous methodological issues in dispute with respect to plant valuation. Reflecting detailed findings based on the evidence, the ALJ determined that the Company's assumptions be adopted with regard to certain aspects of the DCF analysis, and that alternative assumptions proposed by other parties be adopted with regard to other aspects.[9] However, because the ALJ did not have access to the parties' computer models, he suggested that the parties quantify the impacts of his recommendations.[10] They did so in written exceptions and reply exceptions to the ALJ's decision, but their proposed quantification differed.[11] The Board Staff therefore directed its Auditors — who had fully participated in the stranded cost proceeding before the ALJ, had prepared their own independent DCF valuation report on the Company's generating assets to which all parties had access, and were subjected to cross-examination on that report — to quantify the Company's stranded costs based on the ALJ's recommendations. The Auditors' quantification with supporting analysis was distributed to all parties in November 1998.

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9. The ALJ's Initial Decision with respect to these issues and others is summarized in the Board's Final Order. *See* App., 187a-189a. The full Initial Decision was before the New Jersey courts at RA App., 547a *et seq*. The portions of the Initial Decision resolving the methodological issues described above are at RA App., 555a-589a, 599a-605a.

10. The minority opinion of the Supreme Court of New Jersey, concurring in part and dissenting in part, states that the ALJ did not quantify the value of the Company's generation assets because at that time the Company intended to retain those assets through the transition period. Supplemental Appendix to the Petition ("Supp. App."), 33sa. That suggestion is incorrect. As the author of the minority opinion himself recognized, "[t]he issues in the stranded cost filings [before the ALJ] focused on . . . quantification of stranded costs." Supp. App., 21sa. A primary purpose of the stranded cost proceeding was to value the plants as of the date the assets were to become "stranded," *i.e.*, the date of the commencement of competition.

11. Relevant portions of these exceptions were before the New Jersey courts, PS App. at PSa876-946, especially PSa883-95.

Consistent with the Board's understanding announced in April 1997, electric industry restructuring legislation was developed while the open administrative Proceedings were being conducted.[12] On February 9, 1999, the Electric Discount and Energy Competition Act (the "Act") was enacted into law.[13] The Act established the framework, standards, and schedules for restructuring electric utilities in New Jersey, and directed that retail competition for all consumers, along with certain mandated rate reductions, be implemented by August 1, 1999. App., 27a. Confirming key standards that were applied by the Board in the on-going Proceedings, the Act provided express statutory authority for the utility to transfer its generation assets to an unregulated affiliate, and to recover its stranded costs through a "non-bypassable" charge of limited-duration, *i.e.*, a charge that must be collected from all customers — including new customers — that use the utility's distribution service, whether those customers take generation service from the utility or from an alternative provider. App., 27a (citing N.J.S.A. 48:3-59, -61(a), -62(a)). The Legislature also expressly authorized the Board, in implementing industry restructuring under the Act, to make use of the record developed in the Proceedings. *See* N.J.S.A. 48:3-98.

Following passage of the Act, certain parties sought to reopen and supplement the record, in effect seeking to relitigate certain issues, including plant valuation, and to introduce new evidence relating to the proposed sales of fossil fuel generating plants around the United States. App., 367a.[14] The Board denied the motion on March 25, 1999, finding there was ample

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12. Upon issuing the Final Report the Board announced that it was looking forward to working with the State's legislators "to craft legislation which will provide the foundation and necessary legal authority for the changes" it recommended. App., 24a.

13. N.J.S.A. 48:3-49 to –98.

14. Co-Steel took no position on this motion.

competent evidence in the record for its decision with respect to all issues, including the valuation of generation assets; that the proffered new evidence was irrelevant and speculative; and that the entire Proceedings had been conducted in contemplation of the restructuring outlined in the Act. App., 28a, 365a-373a.

At the direction of the Board, the parties then participated in settlement negotiations. Subsequently, two comprehensive settlement proposals were submitted, and all parties were provided the opportunity to submit comments on the alternative proposals. App., 181a–182a. Following review of the proposals and comments the Board, in a summary order issued on April 21, 1999, found the proposal of the group that included Public Service and several parties that had been adverse to it throughout the Proceedings ("Stipulation I") to be "more financially prudent and consistent with the Act's requirements" and with the record than the alternative proposal.[15] Accordingly, the Board adopted Stipulation I, with certain modifications, as "the framework for a reasonable resolution of these matters based on the record . . . ." App., 356a-357a. On August 24, 1999, the Board issued its Final Order which supplemented and elaborated on the April summary order. App., 165a-355a.

B. Throughout the Proceedings the parties were fully aware of (1) the parallel development of the Act; (2) the basis and reasoning underlying the Board's valuation of generation assets, including the role of the ALJ and the Board's Auditors in that process; and (3) the substantial evidence of record concerning the asset transfer.

The Petition misrepresents significant aspects of the Proceedings in order to contend that they were lacking in due process. In fact, all parties were on notice from the outset that the Proceedings would be conducted in parallel with the

15. *See* App., 28a (listing the parties to the alternative proposed resolutions).

development of legislation authorizing and validating competition in the electric industry.[16] As noted above, the Legislature clearly recognized the relevance of the evidence being adduced before the Board and expressly authorized use of the record developed in the administrative proceedings. N.J.S.A. 48:3-98. Thus, Co-Steel's contention that the Proceedings were conducted in the context of "a body of law that was soon to be radically altered" (Petition at 10-11) misstates — indeed completely distorts — the legislative decision to incorporate to the extent relevant the evidence developed by the Board.

Similarly off-the-mark is Co-Steel's characterization of the Board's valuation of Public Service's generating assets for the purpose of stranded cost recovery and valuing the assets transferred to Public Service's affiliate. All parties were aware of the purpose and significance of the plant valuation effort, which was extensively litigated before the ALJ. The parties had a full opportunity to analyze, interpret, and critique the ALJ's recommendations, and attempted, in their exceptions, to influence and persuade the Board. They also had substantial opportunity — for four months before the parties finalized their own stranded cost calculations in preparation of their settlement proposals, and for ten months before the Board's Final Decision — to critique and/or comment on the Auditors' quantification.[17]

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16. *See* note 12, *supra*. The Proceedings were conducted consistent with the Board's broad powers to regulate public utilities under New Jersey law. *See* N.J.S.A. 48:2-13, -19, -21.29. *See also* Supp. App., 6sa-7sa (opinion of the Supreme Court of New Jersey in this matter, discussing the scope of the Board's authority).

17. Co-Steel's contention that the Board relied on a report that was "never made part of any evidentiary record" (Petition at 11) is incorrect. *See* N.J.A.C. 1:1-2.1 (the "record" includes all documents "presented before, during and after the hearing and accepted by the judge for consideration in the rendering of a decision"); R. 2:5-4(a) ("[t]he record on appeal shall consist of all papers on file in the . . . agencies below").

In fact, Co-Steel completely misrepresents the role of the Auditors throughout the Proceedings, incorrectly stating that they had been subject to cross-examination only "on *restructuring* issues." Petition at 11, n.33 (emphasis in original). The record is clear that evidentiary hearings for the purpose of cross-examining the consultants that had prepared the independent audit report valuing Public Service's plants were conducted on three separate days in the stranded cost proceeding before the ALJ.[18]

Finally, Co-Steel's claim that the Board "permit[ted] PSE&G to materially amend its application after the hearing" (Petition at 11), to provide for the transfer of its generating assets to an unregulated affiliate at the outset of the shift to a competitive retail electricity market, is also highly misleading. In fact, the immediate transfer of newly-competitive generation assets out of the regulated utility operations to a separate company was proposed prior to and throughout the Proceedings. Reacting to proposals by several customer and supplier parties (*see* page 5 and note 7, *supra*), the Company acquiesced and agreed in Stipulation I to transfer the assets at the beginning of the transition period. The asset transfer was thus the product of arms-length negotiations among adverse parties rather than a unilateral proposal.

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18. *See* RA App., 658a; transcript of the stranded cost proceedings, T3222-3524, T3629-3779, T3788-3966. The minority opinion of the Supreme Court of New Jersey makes a similar error (Supp. App., 34sa-35sa), incorrectly suggesting that the consulting firm quantifying the ALJ's recommendation may have been a different entity than had taken part in the stranded cost proceeding. As the Board and the parties were well aware, those entities were one and the same. *See, e.g.*, App., 190a (noting that the Auditors' quantification of the ALJ's recommendations were made "using the models [the Auditors] sponsored during litigation" before the ALJ).

C. The Board appropriately relied on the ALJ's comprehensive valuation decision and the substantial evidence of record as the basis for its Final Order.

Co-Steel denigrates the Board's explanation of its valuation of Public Service's generating plants (Petition at 12) by simply ignoring several aspects of the Final Order. As noted above, the Auditors performed their calculations pursuant to the ALJ's detailed recommendations. The three plant valuation scenarios posed by the Auditors were based on the DCF methodology, and differed only with regard to their inflation rate assumptions. The intermediate scenario, which the Board adopted, was consistent with the ALJ's recommendation that the price of new electric capacity should be escalated at the anticipated general rate of inflation proposed by the RPA and not by Public Service.[19]

In its Final Order, the Board reviewed the ALJ's recommendations concerning all material factors bearing on the stranded cost quantification, and fully accounted for the parties' exceptions. *See, e.g.*, App., 187a-190a, 201a-208a. The Board emphasized the ALJ's "detailed and thorough" Initial Decision. App., 299a. The Board then further reviewed the ALJ's treatment of the "proposed adjustments and assumptions of the parties" and formally "adopt[ed] the ALJ's Initial Decision with respect to the magnitude of PSE&G's net-of-tax owned generation stranded costs," as quantified by the Auditors. App., 314a-317a.

The Appellate Division correctly recognized that "[t]he [Board] explained its reasons for adopting the [DCF] methodology and there is absolutely no doubt there was substantial evidence in the record to support its findings on valuation based on that method." App., 70a. The Supreme Court of New Jersey, in its opinion affirming the Appellate Division,

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19. RA App., 586a-587a, 1070a.

similarly noted that the Board's valuation and stranded cost determinations were "based on years of fact-finding and extensive quasi-judicial and quasi-legislative proceedings" in which "[t]he parties participated fully and vigorously at all stages." Supp. App., 16sa. Co-Steel's claim that the Board's valuation was made without explanation or reference to the "evidence in the record of" the stranded cost proceeding (Petition at 12) ignores the ALJ's extensive recommendations, which the Board adopted except as modified in its own Order. Co-Steel also ignores the backup provided to the parties with the Auditors' calculations.[20]

REASONS FOR DENYING THE WRIT

Stripped of its conclusory rhetoric, the sole reason offered by the Petitioner for the Court to grant this extraordinary writ is that this case is "important." However, the Petition fails to identify a single cognizable or compelling federal constitutional issue implicated by this case.

As a preliminary matter we note that the Petition's numerous "blind" citations to inapplicable case law highlight its fundamental shortcomings. For example, *Hill v. Colorado*, 530 U.S. 703 (2000), on which Petitioner relies, involved a direct challenge to the constitutionality of a state statute that violated fundamental First Amendment rights by restricting free speech within 100 feet of a health care facility. The case was not simply "important", as Petitioner alleges; it raised significant and substantial federal questions concerning whether the reasoning in another recent decision of this Court, which involved a

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20. Similarly, in this electric restructuring matter involving billions of dollars, Co-Steel now complains that the Board failed to sufficiently explain why it made a $9 million *reduction* in the Company's stranded costs. Petition at 12-13. However, the Board clearly explained that adjustment, which benefits ratepayers and was detrimental to the Company. *See* Brief of Public Service (N.J. S.Ct.) at 59-60 (September 20, 2000).

different provision restricting free speech, was properly applied by the state court in *Hill*.[21] The Petitioner argues, with a "string citation," that there is authority supporting the proposition that this Court should decide cases that present a question as to whether prior decisions of this Court have been properly interpreted and applied.[22] Yet, the Petition fails to demonstrate that any decisions of this Court or principles of constitutional law have been improperly interpreted or misapplied in this case.

Moreover, the alleged federal constitutional issues Co-Steel urges were for the most part completely undeveloped in the New Jersey courts, whose decisions were based on state law and in which federal constitutional issues were peripheral and insubstantial. Thus, this case does not provide this Court with the kind of thorough treatment of the issues that it ought to have before granting certiorari. In contrast, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), on which Petitioner relies, involved a challenge to a state statute barring a property owner from building any permanent habitable structures on his land, and which the state court, after extensive consideration, determined rendered that property valueless. Despite Petitioner's conclusory allegation that this case similarly involves "substantial" property interests of Co-Steel and others (Petition at 16), there is in fact no identification or analysis, either in the Petition or in the vast record below, of precisely what those alleged property rights are.

While all cases decided by state supreme courts are important to the parties involved (and to the states), that is an insufficient basis on which to grant the extraordinary writ sought here, in the absence of any genuine federal constitutional issue to be decided. The following sections demonstrate that

21. *See Hill, supra*, 530 U.S. at 712-14 (citing *Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357 (1997)).

22. *See* Petition at 16, n.52.

Co-Steel's specific claims in respect of impairment of contract, equal protection, and due process present no genuine federal constitutional issues.

A. Co-Steel's contractual entitlements and expectations have not been altered or diminished in any sense and its contract clearly has not been substantially impaired by the Board's Final Order.

It is well-settled that challenges to state action under the Contract Clause must be based on "substantial" impairment, and that "[m]inimal alteration of contractual obligations may end the inquiry at its first stage." *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244-45 (1978). Where, as here, there is no impairment whatsoever, the claim plainly does not warrant review by this Court.

Pricing under Co-Steel's power supply contract is divided into two "Blocks." Petition at 8. The basis of the Board's decision concerning Co-Steel's alleged contractual rights could not have been clearer: (1) under its contract, Co-Steel's Block 1 usage is to be billed based on the Company's "then effective" HTS tariff, which is subject to the "non-bypassable" stranded cost charges;[23] (2) even when those stranded cost charges are included, HTS customers like Co-Steel, along with all other customers, are to receive substantial net rate reductions mandated by the Act; and (3) Co-Steel's Block 2 usage (approximately two-thirds of Co-Steel's consumption) will continue to be governed by the contractual discounted rate, "vary[ing] hourly with changes in the Public Service's marginal energy cost," plus certain additional charges, and will thus be unaffected by the Final Order — neither stranded cost charges nor mandatory rate reductions will apply. On balance, "Co-Steel

23. App., 33a, 333a-334a, 424a. Co-Steel has acknowledged that a tariff rate, such as the HTS, "prospectively is subject to change at any time by the utility with the regulator's approval." Brief of Appellant Co-Steel Raritan (N.J. Sup. Ct., App. Div.) at 18 (December 10, 1999).

will be receiving power at a net price lower than that originally bargained for as a result of this [Final] Order." App., 32a-33a, 333a-334a.[24]

Thus, the Board found that Co-Steel's contract was simply not impaired.[25] The Appellate Division agreed, concluding that "the contract impairment argument is undermined by Co-Steel's failure to include contingencies for post-contract charges," even though Co-Steel was well-aware at the time it entered into the contract that electric industry restructuring was on the horizon. App., 34a. Co-Steel's argument that its contract "constitutes an agreement [by Public Service] to recover . . . less than the amount to which it would otherwise have been entitled to earn on its *previous* investment" (Petition at 9 (emphasis in original)) is completely unsupported by the terms of its contract, which are unaffected by the Final Order.

Similarly misleading is Co-Steel's suggestion that the Final Order unfairly imposes stranded cost charges on Co-Steel that "essentially equal[] or exceed[] the . . . $60 million cost reduction that Co-Steel obtained" through its contract. Petition at 9-10. Even assuming that Co-Steel's claim regarding the annual amount of the stranded cost charges is correct, it is

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24. Co-Steel's claim that it is *not* receiving power under the Final Order at a lower net price then it bargained for (Petition at 19) is simply incorrect. For example, Co-Steel actually bargained for and its contract explicitly provides for the inclusion of future increases in "demand side management charges" of which Co-Steel now complains (Petition at 19, n.61); the discounts provided under the Act and the Final Order clearly benefit Co-Steel relative to what it would otherwise pay under its bargained for contract. *See* App., 101a, 107a.

25. *See also* App., 105a-106a (Board Order denying Co-Steel's motion for reconsideration, and clarifying that under the Final Order Co-Steel's bargained for agreement remains in place, with appropriate adjustments to the HTS tariff only; that tariff "is not designed, any more than any other tariff is designed, to insulate customers from future additional charges relating to the provision of service").

undisputed that Co-Steel's total contract rate will decline, notwithstanding those "charges", during the period of mandatory rate reductions under the Act. In addition, most of the alleged $60 million in stranded cost charges would be payable, according to Co-Steel, during the period of "ten or more years beyond the Contract term." Petition at 10. During that period, of course, Co-Steel will be free to exercise the option it considered before entering into the contract — leaving Public Service's system and moving its operations out-of-state — in which case it will not pay any stranded cost charges or have any other obligation to Public Service.[26]

It is true that if it chooses to remain on the Company's distribution system, Co-Steel will be obligated — like all other Public Service customers using that system — to pay the Company's distribution rate, including any stranded cost charges. However, Co-Steel's claim that the "practical effect" of that distribution rate is "an outright prohibition on switching," which "will be economically infeasible" (Petition at 10), is not only completely unsupported anywhere in the record, but is based on a misrepresentation of the intended benefits of competition. Like any other distribution customer, Co-Steel's decision whether to switch generation suppliers will be based on a comparison of Public Service's *generation* rate with that of alternative suppliers.[27] The distribution charge, which includes stranded cost charges, will be due to Public Service in either event, and will have absolutely

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26. Co-Steel will also be free at that time to leave Public Service's distribution system by generating its own power, and would in that case similarly avoid stranded cost and other utility charges. Thus, Co-Steel's suggestion that the Final Order has resulted in the imposition of a "post-contract surcharge" (Petition at 20-21) is incorrect.

27. Under the Act, that generation rate will be based on Public Service's cost of procuring generation supplies in the competitive wholesale market, and will thus be outside the utility's control. *See* N.J.S.A. 48:3-57(a), (d); App., 344a-345a.

nothing to do with Co-Steel's decision whether or not to choose an alternative generation supplier.

In an effort to create the impression that its contractual expectations were actually modified under the Final Order, Co-Steel suggests that the Board's decision was based on certain provisions of its contract on which the Board allegedly relied in "permit[ing] the imposition of stranded cost charges." Petition at 17. As clearly set forth in the Final Order and in the Order denying Co-Steel's motion for reconsideration (*see* App., 105a-106a), the Board did not rely on those provisions; there was no need to do so — the contract was simply not impaired but, rather, was enforced under its plain terms.

Moreover, even if the Board had determined that the terms of the contract actually permitted the imposition of stranded cost charges as a "modification", that interpretation of the parties' intent was clearly reasonable and cannot give rise to a constitutional claim. As the Appellate Division recognized, the contract by its express terms was "subject to present and future" laws and regulations, and therefore "Co-Steel knew that its contractual rights were subject to alteration by state legislation." App., 34a. It is apparently Co-Steel's position that this provision simply acknowledges the state of the law, that the contract "could just as well have been silent on the subject," and that the State's exercise of its acknowledged power to modify contract rights still "must be reasonable." Petition at 18-19. Co-Steel does not demonstrate that allowance of stranded cost recovery is unreasonable or inconsistent with this provision. It would, for reasons that are completely unexplained, read this provision completely out of the contract, in violation of well-settled principles of contract interpretation.[28] Co-Steel's reliance

28. *See, e.g., Tennessee Gas Pipeline Co. v. F.E.R.C.*, 17 F.3d 98, 102-103 (5th Cir. 1994) ("the goal of contract interpretation is to determine the parties' intentions by harmonizing and giving effect to each provision within the contract such that none is rendered meaningless").

on the requirement that modifications be "reasonable" is also misplaced, as Co-Steel acknowledges that: (1) even when stranded cost charges are included, Co-Steel's rates will decline under the Final Order during the period of rate reductions required under the Act; and (2) the State's sanction of stranded cost collection by utilities serves legitimate legislative purposes. App., 35a.[29] Finally, Co-Steel's blind citation to a list of cases demonstrating only the *possibility* in other circumstances that *some* public authority *might* be found to have unconstitutionally impaired a contract (Petition at 19, n.59) highlights Co-Steel's inability to explain why this Board, in this case, has done so. Indeed, even a cursory examination of the cases cited by Co-Steel demonstrates that they are readily distinguishable from the case at the bar.[30]

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29. Co-Steel has acknowledged that the collection of stranded costs "provide[s] for a smooth transition from a regulated to a competitive power supply marketplace" and "maintain[s] the financial integrity of the electric public utility through the transition to competition." Brief of Appellant Co-Steel Raritan (N.J. Sup. Ct., App. Div.) at 32 (December 10, 1999) (citing N.J.S.A. 48:3-50(a)(12), -50(c)(4)).

30. *See Allied Structural Steel S.V. Spannaus*, 438 U.S. 234, 246-50 (1978) (involving state statute that required a current recalculation of 10 years of prior contributions to a pension plan based on a new, unanticipated vesting requirement, in a field "never before subject to regulation by the State"); *Minnesota Ass'n of Health Care Facilities, Inc., et al. v. Minnesota Dept. of Public Welfare*, 742 F.2d 442, 450-51 (8th Cir. 1984) (striking down portion of the statute that retroactively required refund of charges not unlawful at the time they were collected, and upholding those provisions of the statute with prospective application); *Bunker Hill Co. v. Washington Water Power Co.*, 561 P.2d 391, 395-97 (Idaho 1977) (reversing commission's attempt to *increase* contract rate in order to bring it to a level uniform with other customers' rates); *Agricultural Products Corp. v. Utah Power & Light Co.*, 557 P.2d 617, 621-25 (Idaho 1976) (same).

Co-Steel's remaining arguments in support of its contract impairment claim are similarly misplaced. For example, in the absence of any impairment, Co-Steel's claim that the restructuring "could just as effectively [have] been carried out *without* impairing the contract" (Petition at 21) is self-serving and tautological. Co-Steel is simply saying that it should be exempt from the requirements of restructuring because it has a contract and that restructuring could be accomplished without its inclusion in the process. Yet if Co-Steel were "excluded," all other customers of Public Service would have to shoulder Co-Steel's share of the stranded cost charge.

Moreover, Co-Steel's veiled suggestion that its exclusion from the restructuring regime is required because of the State Attorney General's "approval" of the contract (*id.*) distorts both the facts and the law. The State did not "agree" to exempt Co-Steel from its fair share of the costs of restructuring. As the Appellate Division recognized, and Co-Steel apparently does not dispute, the real *parties* to the contract are Public Service and Co-Steel. App., 35a. In *Nieves v. Hess Oil Virgin Islands Corp.*, 819 F.2d 1237, 1243 (3d Cir. 1987), on which Co-Steel relies, the court held that where, as here, the government is not a party to the contract allegedly impaired, "courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Id.* (citing *Energy Reserves, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412-13 (1983) (internal quotations omitted)).

B. The Board's decision to insulate Co-Steel's "Block 2" consumption from any stranded cost charges, and to enforce Co-Steel's contract as written in respect of that consumption, cannot give rise to a federal constitutional claim that Co-Steel has been deprived the equal protection of the law.

Co-Steel's appeal to the language of "equal protection" is a pretextual effort to manufacture a federal constitutional issue where none exists. The Petition's lone reference to "equal protection" in the last sentence of Co-Steel's brief point (*see* Petition at 21-25), is wholly undeveloped and supported solely by a blind citation to two decisions of this Court. In contrast to those cases, any "differential" treatment of Co-Steel and other ratepayers in this case has a rational basis related to the purpose of the Act.[31]

As a preliminary matter, the Board's interpretation is consistent with the statutory language. In subsection 4(d)(1) of the Act (N.J.S.A. 48:3-52(d)(1)), the Legislature intended to reduce the rates of customers receiving service under tariffs providing for fixed rates (*e.g.*, HTS rates) to which a "percentage reduction" versus rates on April 30, 1997 could logically be applied. The "April 30, 1997" rate in the case of Co-Steel's Block 2 usage was not a fixed tariff rate, but was

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31. The Petition at 25, n.71. cites *Smith v. Cahoon*, 283 U.S. 553 (1931) (striking down a statute requiring certain private carriers to obtain insurance and formal approvals but exempting others (*e.g.*, those exclusively carrying agricultural products) from those requirements, where there was no justification for distinguishing between the classes, and the regulation was wholly arbitrary), and *F.S. Royster Guano v. Virginia*, 253 U.S. 412 (1920) (striking down a state tax system exempting entirely the income derived from outside the state by local corporations that do no local business, where the classification had "no fair or substantial relation to the proper object sought to be accomplished" and the unequal operation of the taxing system was in fact due to inadvertence rather than design).

instead a heavily discounted market-based rate subject to hourly variation with change in the Company's "marginal energy cost." App., 102a. While Co-Steel would obviously prefer a rate that is ten percent lower than the hourly market-based rate at all times, the statute clearly bases the required rate reductions on class-wide rates at a fixed point in time, and Co-Steel's "preferred" result is thus inconsistent with the language of the Act.[32]

Co-Steel's appeal to the "well understood" meaning of the term "customer class" for purposes of interpreting subsection 4(d)(1) is also unavailing. The fact that Co-Steel takes its service under Public Service's EHEP tariff, and that that tariff "appears as Sheet No. 85 in PSE&G's published tariffs" (Petition at 23, n.69) does not define or create a "customer class" for the unrelated purposes of the rate reduction.[33] Similarly, Co-Steel's reliance on the Board's new supplier licensing regulations and the fact that Public Service reports the usage of entities served under the EHEP tariff as "customers" on its FERC Form 1 (Petition at 23, n.69) begs the question of whether and how a rate reduction under the

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32. Co-Steel's reliance on *P.F. ex rel. B.F. v. New Jersey Div. of Dev. Disabilities*, 139 N.J. 522 (1995) (see Petition at 22 n.68) is completely off the mark. In that case the court recognized that "courts typically defer to statutory interpretations by administrative agencies," and that such deference is inappropriate only where the agency's interpretation "clearly conflicts with the intent of the Legislature." *Id.* at 529. The agency's decision in that case not only directly contravened the intent of the Legislature, but completely ignored the "abundantly supported conclusions" of the administrative law judge.

33. Tariff Sheet No. 85 itself clearly provides that "[s]ervice under this rate schedule is available on an individual contract basis," that "the customer's cost of energy will vary hourly" with changes in "marginal energy cost," and that "[a]ll other terms of the service are described by the contract." *See* App., 420a–421a.

Act should apply to a particular customer taking service under a contract rate.[34]

Finally, by focusing its Petition on these challenges to the Board's statutory construction, Co-Steel completely ignores the standards governing equal protection claims.[35] A statutory provision distinguishing between customers subject to a fixed tariff (such as the HTS rate) and those taking power under a market-based, floating contract rate does not result in a suspect or quasi-suspect classification, and does not impair any party's fundamental rights.[36] Therefore, the provision would be subject to "rational basis" review, under which it must be upheld if "any set of facts reasonably may be conceived to justify" the challenged classification. *See Wroblewski v. City of Washburn*, 965 F.2d 452, 459 (7th Cir. 1992). *See also Hodel v. Indiana*, 452 U.S. 314,

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34. Co-Steel's reliance on four out-of-state cases (Petition at 23, n.69), all of which are distinguishable (*see* Brief of Public Service (N.J. Sup. Ct., App. Div.) at 96, n.116 (January 5, 2000)) similarly does not support its claim that the Board has misinterpreted the New Jersey statute at issue in this case.

35. Co-Steel also improperly ignores the well-settled principle requiring a reviewing court to accept an agency's reasonable interpretation of an ambiguity in a statute the agency is charged with administering. *See* note 32, *supra*. *See also Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1 (D.C. Cir. 1976) (considerable deference is owed to interpretation of statute, particularly a new statute, by the agency charged with its administration).

36. "Suspect" classification under the equal protection clause includes classification based on race, nationality, or alienage. *See Graham v. Richardson*, 403 U.S. 365, 372 (1971). "Quasi-suspect" categories that have been implicitly recognized by the Court include gender and illegitimacy. *See, e.g., Levy v. Louisiana*, 391 U.S. 68 (1968). "Fundamental" rights include the right to privacy and the right to vote. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

331 (1981) ("[s]ocial and economic legislation . . . that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose"). Classification involving neither fundamental rights nor suspect qualifications is accorded a strong presumption of validity. *See, e.g., FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314-15 (1993). Moreover, "[o]nce a facially legitimate reason for the classification is found, whether such a reason was articulated by Congress or not, [the court] must rule the classification constitutional." *DeSousa v. Reno*, 190 F.3d 175, 184-85 (3d Cir. 1999).

Enforcement of Co-Steel's market-based, discounted Block 2 rate under its contract without further rate reductions is entirely consistent with and rationally related to the legislative purposes underlying the Act. Specifically, the Act established a State policy to "[p]lace greater reliance on competitive markets . . . to deliver energy services to consumers," and the Legislature specifically found that "traditional utility rate regulation is not necessary" in the "competitive electric generation . . . market [that] has developed" in New Jersey. N.J.S.A. 48:3-50(a)(2), -50(b)(1), (2). As discussed above, Co-Steel's market-based contract rate is itself a result of these trends and related legislation pre-dating the Act. Co-Steel in fact acknowledges the basis of the distinction drawn by the Board:

> [T]he distinction . . . between Co-Steel's tariff and those applicable to everybody else was based upon the fact that Co-Steel's Block 2 purchases are based on market prices. This is true.

Petition at 24.

Application of the rational basis test (which Co-Steel completely ignores) should be the end of the "equal protection" analysis. In light of the Board's rational implementation of the legislative purpose of the Act and the lack of any constitutionally cognizable discriminatory treatment alleged by Co-Steel, there is simply no reason to grant the Petition on equal protection grounds.

C. In light of the Board's reliance on extensive hearings conducted with the on-going development and passage of the Act, in which all parties were afforded notice and an opportunity to be heard in respect of all issues, this case does not pose any question about the limits that the Federal Constitution may place on the procedures followed by state administrative agencies.

The due process clause is not designed to provide a dissatisfied litigant the opportunity to isolate alleged deficiencies in an administrative agency's approach to resolving a complex, multi-faceted matter. In light of the exhaustive, comprehensive, open Proceedings described above, Co-Steel's conclusory references to "boilerplate" language concerning the requirements of due process (Petition at 25) cannot justify further review by this Court.

Courts normally defer to an administrative agency's choice of the type of proceedings through which the agency informs itself and acts, so long as the selection is responsive to the purpose and function of the agency. *See Securities and Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 202-203 (1947). For example, *United States v. Florida East Coast Railway Co.*, 410 U.S. 224, 241-42 (1973), involved a challenge to a fee established by the Interstate Commerce Commission ("ICC") after a "notice and comment" period. The affected party claimed that the statute, which stated that the fee was to be established after a "hearing", required an oral evidentiary hearing. Because the parties "had fair notice

of exactly what the [ICC] proposed to do, and were given an opportunity to comment, to object, or to make some other form of written submission," this Court held that the hearing requirement had been satisfied. Consistent with these principles, administrative agencies may fashion their proceedings flexibly to accomplish their regulatory mission. *See, e.g., RCA Global Communications, Inc. v. F.C.C.*, 559 F.2d 881, 887 (2d Cir. 1977) (holding that the statutory requirement of a "full hearing" in a proceeding to establish a formula governing the distribution of telegraph traffic was satisfied by a "notice and comment" procedure involving written submissions by interested parties); *American Public Gas Ass'n. v. FPC*, 567 F.2d 1016, 1064-67 (D.C. Cir.), *cert. denied*, 435 U.S. 907 (1977) (nationwide rates for natural gas sales, under statute requiring agency to fix rates after a hearing, may be established through notice and comment procedure without cross-examination or examination under oath of those making written submissions). New Jersey law is entirely consistent with these principles of administrative law enunciated by this Court and applied by lower federal courts and agencies.[37]

As it does throughout the Petition, Co-Steel provides numerous "blind" citations in support of its "due process" argument without suggesting how or why the cases cited apply to the facts at hand. Again, closer scrutiny reveals that those cases uniformly fail to support Co-Steel's positions. For example, *Goldberg v. Kelly*, 397 U.S. 254 (1970), on which Co-Steel relies, struck down procedures permitting the termination without prior notice or hearing of welfare benefits to which the complainants were entitled by statute.

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37. *See, e.g., Texter v. Department of Human Services*, 88 N.J. 376, 385-86 (1982); *Crema v. New Jersey Dep't. of Envtl. Protection*, 94 N.J. 286, 299 (1983) ("[a]dministrative agencies enjoy a great deal of flexibility in selecting the proceedings most suitable to achieving their regulatory aims," and a "high degree of discretion in exercising that choice reposes in the administrative agency") (citations omitted).

In light of the extensive opportunity granted to all parties to be heard in this case, *Goldberg* is clearly inapplicable.[38]

All parties in this case, including Co-Steel, had a full understanding of the substantive and procedural standards applicable to the Proceedings, fair notice of the matters to be determined, and ample opportunity to place their positions on the record — including the opportunity to take part in extensive live hearings, confront adverse witnesses, and submit voluminous written comments at all stages. The Board's decisions were based solely on evidence in the record and the rationale underlying all aspects of the Final Order was clear. The Board's procedures in this matter clearly satisfied the requirements of due process.

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38. Moreover, Co-Steel has not attempted, either in its Petition or anywhere in the vast record below, to identify the property or other interest, analogous to the statutory entitlement to the "means for daily subsistence" at issue in *Goldberg*, *supra*, 397 U.S. at 255, 261-64, that it believes the due process clause of the federal constitution would be required to protect in this case.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CO-STEEL RARITAN,

Petitioner,

v.

NEW JERSEY BOARD OF PUBLIC UTILITIES,

Respondent.

On Petition for Writ of Certiorari
To the Supreme Court of the State of New Jersey

BRIEF OF RESPONDENT NEW JERSEY BOARD OF PUBLIC UTILITIES IN OPPOSITION

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COUNTER-STATEMENT OF THE CASE

A. Procedural History

The New Jersey Board of Public Utilities ("BPU") is an agency within the Executive Branch of the State Government which has been vested by the State Legislature with general jurisdiction and control over all public utilities in New Jersey. *N.J.S.A.* 48:2-1 and 2-13. This case arises out of the BPU's August 24, 1999 Final Decision and Order ("Final Order") (165a)[1], resolving Public Service Electric and Gas Company's ("PSE&G") rate unbundling, stranded costs and restructuring filings, and a related September 17, 1999 Bondable Stranded Costs Rate Order ("BSCRO")(111a), allowing PSE&G to issue bonds to refinance certain of its stranded costs. The Orders were issued pursuant to the Electric Discount and Energy Competition Act of 1999, *N.J.S.A.* 48:3-49 *et seq.* ("EDECA").

Petitioner Co-Steel Raritan ("Co-Steel") and two other parties, the Division of the Ratepayer Advocate ("RA") and the New Jersey Business Users ("NJBUS"), appealed from the BPU's Orders. On April 13, 2000, the Superior Court of New Jersey, Appellate Division ("NJAD"), the State's intermediate appellate court, issued a detailed Order unanimously affirming the BPU's Final Order and BSCRO, and rejecting Co-Steel's arguments, which focused primarily on the narrow issue of the impact of the BPU's decision on Co-Steel's already-discounted Special Contract rates, as well as the more general substantive and due process arguments raised by the RA and NJBUS. ("NJAD Order")(14a).

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[1] "_a" denotes the appendix filed by Co-Steel with its petition to this Court. "_sa" denotes the supplemental appendix filed by Co-Steel.

Thereafter, Co-Steel filed a notice of appeal with the State's highest appellate court, the New Jersey Supreme Court ("NJSC"), purportedly pursuant to *R.* 2:2-1(a)(1), which provides for an appeal as of right in cases involving a "substantial question arising under the Constitution of the United States or this State." By Order dated July 14, 2000, the NJSC ruled that the appeal "does not raise a substantial constitutional question in accordance with *R.* 2:2-1(a)(1) and the case law interpreting that provision." (11a). The NJSC on its own motion, however, decided to review Co-Steel's submission under the standards applicable to a petition for certification and granted certification, limited to one statutory interpretation issue,[2] while denying certification as to all other issues raised, "including claims of impairment of contract." *Id.* The NJSC also granted petitions for certification filed by the RA and NJBUS. (13a).

After supplemental briefing and oral argument, the NJSC, recognizing the need for expedited resolution of the appeals, issued an Order on December 6, 2000, affirming the NJAD's Order by a 4-1 vote. (1a).[3] The Order stated that the opinions of the Court would be filed "in due course." *Id.*

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[2] The issue was whether the initial 5% rate reduction required by *N.J.S.A.*48:3-52(d)(2) of EDECA on August 1, 1999, should be measured relative to 1999 or 1997 rates.

[3] The Final Order provided that customers would receive an additional 2% rate reduction after PSE&G issued bonds to refinance its stranded costs at a lower interest rate. PSE&G was unable to issue such bonds while the appeals were pending, which, in turn, delayed the additional rate reduction. Shortly after the NJSC issued its December 6, 2000 Order, the bonds were sold and the rate reduction was implemented.

On March 6, 2001, Co-Steel filed a Petition for a Writ of Certiorari. The BPU sought and received permission to extend the time for filing its responding brief until after the opinions of the NJSC were issued. On May 18, 2001, the NJSC issued its opinions in this matter. (1sa). The time for filing responding briefs was later extended until July 9, 2001.

B. Background and Overview of the BPU's Final Order

As summarized in the NJAD's Order, the BPU's Final Order was the result of a five-year process to restructure the electric industry in New Jersey to facilitate the emergence of a competitive electric supply marketplace so as to lower costs and rates and improve the quality and choices of service for all customers. (20a-29a). Specifically, in March 1995, the New Jersey Energy Master Plan Committee issued a report ("EMP Report") outlining a general policy framework for a transition from power supply monopolies to competitive markets and directed the BPU to investigate changes to the structure of the electric industry as a means of lowering the cost of electricity in the State. The EMP Report also recommended several interim measures, including the enactment of transitional legislation, to help retain "at risk" customers during the transition to full competition. One such "at risk" customer was Co-Steel Raritan, which, at the time, was threatening to close its in-State steel mini-mill and shift production to a state with lower energy costs. As described below, in 1995 the BPU acted under its existing authority to retain Co-Steel as a customer of PSE&G by approving a ten-year Special Contract at sharply discounted rates. (31a-32a).

In response to the directive of the EMP Report, the BPU began a proceeding to investigate changes to the electric industry in New Jersey, which included public hearings and

comments, negotiations among representatives of the various affected stakeholders, and the release for comments of a draft report. On April 30, 1997, the BPU issued an Order adopting a Final Report entitled "Restructuring the Electric Power Industry in New Jersey: Findings and Recommendations" ("Final Report"), containing its findings and recommendations to introduce competition into the State's retail electric marketplace. (24a). The Final Report noted the need for enabling legislation "to provide the foundation and necessary legal authority for the changes recommended." *Id.*

Anticipating that competition could begin by late 1998, the BPU directed each of the State's four electric utilities to submit rate unbundling, stranded costs and restructuring filings by July 1997. The rate unbundling filings involve the manner in which the single per kilowatt-hour ("kWh") charge would be separated into its component parts (generation, transmission, distribution, etc.); the stranded costs filings relate to the quantification and rate treatment of the utilities' above-market, *i.e,* stranded, costs that would have been recoverable had they continued as regulated monopolies; and the restructuring filings relate to the corporate reorganization of the utilities in a competitive environment, including the possible divestiture or transfer of generating assets.

PSE&G's filings, submitted in July 1997, received intense administrative scrutiny. The rate unbundling and stranded costs filings were the subject of 20 days of evidentiary hearings before an Administrative Law Judge ("ALJ"). An additional 20 days of hearings were held before the BPU on the restructuring filing. More than 40 parties participated and over 20 parties, including Co-Steel, filed testimony analyzing and contesting various elements of PSE&G's proposals. In addition, the BPU hired an

independent auditing firm ("ICF") to audit PSE&G's filings. Extensive initial and reply briefs were filed. (175a-180a).

A detailed 101-page Initial Decision ("ID") was issued by the ALJ in August 1998 on the rate unbundling and stranded costs issues, the key elements of which are summarized in the Final Order (183a-199a). The ALJ made specific findings on the numerous individual disputed issues, but did not quantify the resulting total recovery-eligible stranded costs dollar amount, suggesting instead that the parties meet to quantify the results of his recommendations. When the parties were unable to agree on a quantification, BPU Staff ("Staff") asked ICF, the independent auditor hired by the BPU, to quantify the ALJ's findings. In November 1998, Staff sent a letter to the BPU and all parties enclosing ICF's calculations and supporting workpapers, which detailed three different values for the ALJ's findings on net-of-tax stranded costs, depending on what assumptions are used for the rate of inflation. (54a). Staff's cover letter indicated that the submission "represents the best interpretation and quantification of the ALJ's Initial Decision" by ICF, but noted that the quantification "does not necessarily represent the position of the BPU Staff." (54a-55a). No party responded to Staff's letter or raised any issue with any aspect of ICF's calculations. Exceptions and reply exceptions were filed to the ID. (200a-208a).

While the administrative review of PSE&G's filing was proceeding, restructuring legislation was being developed. In enacting EDECA on February 9, 1999, the Legislature determined that the traditional retail monopoly for electric power generation which electric public utilities have held in New Jersey for over 80 years should be eliminated, and all consumers shall be given the opportunity to access the competitive market and select an electric power supplier of

their choice by August 1, 1999. *N.J.S.A.* 48:3-50(b)(3). While New Jersey's move towards competitive retail power markets in many ways paralleled regional and national developments, EDECA provides a unique and distinct framework for the restructuring of New Jersey's electric utilities, notably, by requiring that substantial rate reductions be implemented and sustained over a four-year transition period, while simultaneously allowing electric utilities an opportunity to recover their stranded generation costs, and by pro-actively encouraging the development of a competitive energy supply market by immediately opening 100% of the retail market to full competition and providing for so-called "shopping credits" to stimulate competition.

EDECA establishes the framework and time schedule for retail electric competition in New Jersey. It mandates a 5% rate reduction by August 1, 1999, the start date for retail competition, and a 10% reduction from 1997 rates by August 1, 2002, to be sustained through July 31, 2003. *N.J.S.A.* 48:3-52. EDECA provides electric utilities the opportunity to recover eligible stranded costs, as determined by the BPU, through a limited-duration, nonbypassable market transition charge ("MTC"), *N.J.S.A.* 48:3-61, and to refinance certain eligible stranded costs, as determined by the BPU, through the issuance of asset-backed securities, to mitigate the rate impact of stranded cost recovery. *N.J.S.A.* 48:3-62. EDECA also permits utilities to recover the costs of certain approved social programs, conservation and environmental programs, as well as nuclear decommissioning and consumer education costs, through a nonbypassable societal benefits charge ("SBC"). *N.J.S.A.* 48:3-60. Unlike the case in some states, EDECA does not mandate divestiture, but permits utilities to divest their generation assets to third parties or to transfer them to a non-regulated affiliate, subject to a finding by the

BPU that certain conditions are met. *N.J.S.A.* 48:3-59. Significantly however, while EDECA sets forth clear policy directives and timetables for implementing retail choice and provides guidelines and parameters for the BPU to follow, it leaves many implementation decisions to the BPU's technical expertise in adopting individual rate unbundling, stranded cost recovery and restructuring plans for each utility.

Shortly after EDECA's enactment, the BPU set a schedule to render its decisions for each electric utility prior to the August 1, 1999 statutory deadline. The BPU encouraged the parties to attempt to negotiate settlements. While no unanimous settlement was reached in the PSE&G case, discussions among the parties led to the submission of two alternative non-unanimous settlement proposals, the first sponsored by PSE&G and seven other parties ("Stipulation I"); the second sponsored by the RA and five other parties ("Stipulation II"). (28a). Co-Steel was not a signatory party to either proposal. All parties were given the opportunity to submit written comments to the BPU on both proposals, and extensive comments and reply comments were filed by 20 parties. (243a-295a). Co-Steel filed comments limited to the issue of how Stipulation I would impact its Special Contract rates. (273a-275a).

On March 8, 1999, the Mid-Atlantic Power Supply Association moved to reopen and supplement the record in the PSE&G unbundling and stranded costs proceedings in light of EDECA and the settlement proposals. The RA and NJBUS supported the motion and PSE&G opposed it. Co-Steel took no position on the motion. By Order dated March 25, 1999, and again in its Final Order, the BPU rejected arguments that the record should be reopened for additional hearings, finding that there was ample evidence in the record for a decision and

that the proceedings had been conducted in contemplation of anticipated restructuring legislation. (28a; 300a). On this issue, the Final Order cites *N.J.S.A.* 48:3-98, which allows the BPU to rely upon filings submitted and proceedings conducted prior to, and in anticipation of, EDECA's effective date, provided "the board shall take such actions as may be necessary, if any, to ensure that the requirements of [EDECA] are met in all regulatory actions which were commenced prior to its enactment." (46a). The BPU found that this requirement of EDECA had been met and that the filings submitted and the proceedings prior to EDECA's effective date were thorough and complete and satisfied its requirements. (298a).

The BPU considered the PSE&G matter at its April 20, 1999 public agenda meeting. Finding Stipulation I to be more financially sound and consistent with EDECA's requirements than Stipulation II, and after careful consideration of the record, the BPU issued a Summary Order on April 21, 1999 (356a-364a), and a detailed Final Decision and Order on August 24, 1999 (165a-355a), incorporating, as a fair resolution of the proceedings, the framework and major elements of Stipulation I, with significant modifications to key provisions, including those related to rate reductions, stranded costs and the transfer of assets. The BPU's modifications reflect consideration of the concerns raised in the comments and by the proponents of Stipulation II. (300a-301a).

The 126-page Final Order contains detailed interrelated findings, supported by the vast record. The findings include: the establishment of a four-step rate reduction to be phased in and sustained during the transition period; a determination as to certain allowable sources of funding for the rate reductions; approval for the limited use of deferred accounting during the transition period; the establishment of shopping credits; the

valuation of PSE&G's generating assets and the determination of its recovery-eligible stranded costs based on the ALJ's recommendations as quantified by ICF (using the middle of ICF's three inflation rate scenarios); approval for PSE&G to transfer its generating assets to an unregulated affiliate at a determined price, subject to certain terms and conditions; a determination as to the level of stranded costs eligible for securitization; the establishment of nonbypassable market transition and societal benefits charges; the establishment of unbundled rates for the various rate classes; and findings as to how the rate reductions and nonbypassable charges would be applied to Co-Steel's Special Contract rates. (297a-355a).

Subsequently, on September 17, 1999, the BPU issued its BSCRO, allowing PSE&G to refinance or securitize certain of its stranded costs, subject to certain terms and conditions, and establishing a nonbypassable transition bond charge ("TBC") to reflect the rate impact of securitization. (111a). A motion for reconsideration filed by Co-Steel was denied by BPU Order dated October 19, 1999. (94a-110a).

C. Issues Relevant to Co-Steel's Petition

Co-Steel owns and operates a steel mini-mill in PSE&G's service territory in New Jersey. Prior to 1995, Co-Steel was served under PSE&G's High Tension Service ("HTS") Tariff. In late 1994, after Co-Steel threatened, absent significant relief from its high energy costs, to close its New Jersey facility and to move its production to a state with lower energy costs, Co-Steel and PSE&G negotiated a ten-year service agreement ("Special Contract"). The agreement provides that Co-Steel will remain in New Jersey and make capital improvements to its facility in exchange for receiving special discounted pricing during a ten-year term. The

agreement is silent as to what will occur after its expiration (32a), but includes a provision that it is "subject to present and future local, state and federal laws and to the regulations or orders of any local, state or federal regulatory authority having jurisdiction over the matters set forth herein..." ("Paragraph 9"). (34a). The agreement also provides that taxes, assessments, or other charges incurred by PSE&G in connection with the service provided, which were not applicable at the time of entering into the agreement, shall be passed through to Co-Steel. ("Paragraph 7"). *Id.* A stipulation modifying elements of the agreement was signed by PSE&G, Co-Steel, Staff and the RA in July 1995 and was approved by BPU Order dated November 17, 1995. (32a).

Under the approved Special Contract, electric service to Co-Steel is priced in two blocks: the first 13 million kWh ("Block 1"), about one-third of its monthly usage, continues to be billed "at prices, terms and conditions identical to PSE&G's then-effective Rate Schedule High Tension Service (HTS)," that is, at whatever the HTS tariff rate is at a particular time; charges on the remaining two-thirds of its usage are billed at a discounted rate ("Block 2 Discounted Rate"), pursuant to a newly created Experimental Hourly Energy Pricing Tariff ("EHEP"), based upon the wholesale hourly marginal energy price on the PJM power pool system serving Pennsylvania, New Jersey and Maryland. *Id.*[4]

The Special Contract reduced Co-Steel's annual electric bill by approximately 25% relative to the HTS tariff rates, from approximately $24 million to $18 million. (33a). In

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[4] Co-Steel is the only customer ever served under the EHEP Tariff. Approximately 200 large volume industrial customers take electric service under PSE&G's HTS Tariff.

addition, with the approval of the New Jersey Department of Treasury, Co-Steel received a discounted tax rate on energy purchased under the Special Contract. *Id.*

In the case before the BPU, Co-Steel argued that its Special Contract precludes the imposition of stranded cost charges either during or after the contract term. In its Final Order, the BPU determined that under *N.J.S.A.* 48:3-60, 61, and 67, HTS customers, along with all other electric public utility customers (except onsite generator customers, *N.J.S.A.* 48:3-77), were subject to nonbypassable stranded cost and societal benefits charges (MTC, TBC and SBC). At the same time, even while paying these charges, HTS customers would see overall rate reductions totaling 13.9% by August 1, 2002, which reductions were partly due to securitization of stranded costs. (33a). The BPU ruled that Co-Steel's Block 1 rate would reflect both the stranded cost charges and the rate reductions applicable to all HTS customers. Additionally, the BPU ruled that Co-Steel's Block 2 Discounted Rate, established pursuant to the Special Contract, would be unaffected by the BPU's Orders for the remainder of the term of the contract. Thus, the BPU did not modify the Special Contract, it simply enforced the contract as written; Co-Steel's Block 1 rate matches the current HTS tariff rates, as provided for in the Special Contract, and its Block 2 Discounted Rate remains unchanged for the duration of the ten-year agreement. (333a-334a).

The BPU also rejected Co-Steel's arguments that it should be exempt from any stranded costs charges after the expiration of the Special Contract. The BPU noted that after the Special Contract expires, Co-Steel will be subject to the same obligations and have the same rights as all customers under applicable law, including the ability to shop for an alternate supplier. (334a).

In its motion for reconsideration to the BPU, Co-Steel argued that the BPU's application of EDECA to Co-Steel's Special Contract rates violated the constitutional prohibition against impairing the obligation of contracts. (96a). Co-Steel also raised several alternative arguments, should the BPU maintain its position on the applicability of stranded cost charges to the Block 1 rates. (96a-97a). Among these was an argument that the statutory rate reductions should apply to both blocks of its Special Contract. Specifically, Co-Steel argued that EDECA mandates that rates for each customer class be reduced, and that its Block 2 discounted rates under the discounted EHEP tariff should be deemed a separate customer class for the purpose of rate reductions.

In response, PSE&G argued that Co-Steel cannot claim that EDECA supersedes the Special Contract to provide rate reductions while at the same time arguing that EDECA cannot supersede the Special Contract and allow for the imposition of stranded cost charges. PSE&G also cited to EHEP Tariff Page 85 which provides that "service under this rate schedule is available on an individual contract basis," and that "customer's cost of energy will vary hourly", with changes in "marginal energy cost" and that "all other terms of the service are described by the contract." (102a).

On reconsideration, the BPU reaffirmed its decision to apply the statutory charges and rate reductions to Co-Steel's Block 1 rates. The BPU also rejected all of Co-Steel's alternative arguments, including that the statutory rate reduction should be applied to Block 2 rates as well, finding that "it is much more reasonable to interpret the limited reference to 'customer class' set forth at [*N.J.S.A.* 48:3-52(d)] to mean customers served under fixed tariffs, not customers that have made separate arrangements to receive service at heavily discounted rates." (108a).

On appeal to the NJAD, Co-Steel argued that the BPU's Final Order constitutes an unconstitutional impairment of its Special Contract because it imposes unanticipated legislatively mandated stranded cost charges on Co-Steel's power usage both during and after the contract period. Co-Steel again raised several alternative arguments should its main contract impairment contention fail, including that the statutory rate reductions should apply to both blocks of its Special Contract.

The NJAD rejected all of Co-Steel's arguments. After discussing the federal and state constitutional provisions prohibiting the impairment of contracts, the relevant case law and the three-pronged test applied by federal and state courts to determine whether a contract has been unconstitutionally impaired, and after considering the facts and arguments in the instant case, the NJAD found that "[t]he BPU's decision was grounded solidly on holding the parties to the terms of Co-Steel's contract with PSE&G." (30a-38a). The NJAD further found that the legislatively mandated charges "are covered under the plain language of paragraph seven." (35a). The NJAD concluded that Co-Steel's contract had not been substantially impaired by the BPU's Orders implementing EDECA, but even if Co-Steel could satisfy this first prong of the test, it fails the second and third prongs, because there is a legitimate purpose behind the collection of stranded costs by utilities and the legislative policy to provide for a smooth transition from a regulated to a competitive power supply marketplace, while maintaining the financial integrity of the electric utility through the transition to competition. *Id.*

As to Co-Steel's liability for statutorily mandated stranded costs charges after the expiration of the Special Contract, the NJAD found that the Special Contract does not call for any special post-contract treatment, and that it is reasonable that Co-Steel bear its share of the stranded cost

charges that are an integral part of the deregulation scheme. (36a). The NJAD noted that when the contract expires, and if Co-Steel remains in New Jersey, it may also receive benefits from competition among energy suppliers. *Id.*

The NJAD also rejected Co-Steel's alternate argument that the statutory rate reductions should apply to both blocks of its usage. Fundamentally, the NJAD found that the BPU's determination to enforce the contract as written was a valid basis for the BPU's decision. (38a). Additionally, the NJAD upheld the BPU's determination that while Co-Steel had previously been given a special discounted rate, which literally put it into a class by itself, it should not be considered as a separate "customer class" under *N.J.S.A.* 48:3-52(d), for the purpose of receiving an additional rate decrease on top of its already heavily discounted rate. *Id.* The NJAD noted that the interpretation of "customer class" announced by the BPU, the administrative agency charged with enforcement of EDECA, should be given great weight by the court. *Id.*

As noted above, the State's highest appellate court declined to hear Co-Steel's arguments regarding alleged impairment of contract and denial of equal protection, finding that "the appeal does not raise a substantial constitutional question" warranting that court's review. (11a).

As to the alleged due process violations raised herein by Co-Steel, these issues were not raised by Co-Steel before either State appellate court. (Petition, footnote 42). They were, however, raised by other parties, and were carefully considered and decisively rejected by both the unanimous NJAD Order and the NJSC Majority Opinion. (20a; 42a-61a; 16sa). The NJAD concluded that, while the administrative proceedings leading up to the BPU's Orders were "unusual"

in a number of ways, due in very substantial part to the short time period in which EDECA mandated the onset of retail competition and rate reductions, all parties had ample opportunity to be heard on all aspects of all decisions and there was no denial of due process or fundamental unfairness. (20a; 61a). The NJAD "unhesitatingly conclude[d]" that the parties were provided with the essential requirements of due process throughout the hearings, comment periods and settlement negotiations, and that none of the alleged procedural irregularities rose to the level of a denial of constitutional due process or of State law. (61a). In particular, the NJAD found that the BPU did not err in declining to reopen the record for additional hearings after the passage of FDECA and/or after allegedly new issues were raised in Stipulation I, finding that the parties had notice and opportunity to be heard on all issues raised therein, including the asset transfer, and that the essential requirements of due process were met. (42a-52a). The NJAD further found that the BPU's reliance on the independent auditor's report to quantify the ALJ's findings "was not a procedural irregularity sufficient to deny the RA due process." (56a).

The State's highest appellate court, with one justice partially dissenting, affirmed the NJAD's Order in its entirety. (1sa). In affirming the NJAD's Order with respect to challenges regarding the BPU's reliance on the auditor's quantification of the ALJ's findings, the NJSC Majority Opinion found that the BPU's Final Order reflects findings "that are supported by the record and consistent with EDECA." (15sa). In determining that the BPU's decision on stranded costs and asset valuation should not be set aside, the NJSC Majority Opinion concluded:

The BPU's valuation of PSE&G's generation facilities

and its stranded costs were based on years of fact finding and extensive quasi-judicial and quasi-legislative proceedings. The parties participated fully and vigorously at all stages. We find no procedural infirmity that would compel us to remand at this juncture for additional hearings on those matters.

[16sa].

ARGUMENT

THE WRIT SHOULD BE DENIED SINCE PETITIONER HAS FAILED TO DEMONSTRATE A FEDERAL QUESTION OF PUBLIC IMPORTANCE, OR A CONFLICT WITH ANY DECISIONS OF THIS COURT OR ANY OTHER COURT; MOREOVER, THE ISSUES RAISED IN THE PETITION HAVE ALREADY BEEN REVIEWED AND PROPERLY REJECTED BY THE STATE APPELLATE COURTS

The writ sought herein should be denied because petitioner has failed to demonstrate a federal question of public importance and, in fact, concedes that "this case does not present a case in conflict with decisions of the courts below, nor a conflict among federal courts." (Petition at 16).

Notwithstanding Co-Steel's assertion that this is an "important case" (Petition at 16), at its essence, Co-Steel's petition involves a very narrow issue of limited applicability: whether the BPU properly applied the provisions of a 1999 State electric restructuring statute, which provides for rate reductions and for the assessment of certain charges to

customers, to the unique circumstances of one particular customer, who has been receiving the benefit of highly discounted rates through a one-of-a-kind, ten-year Special Contract, approved in 1995. This issue turns on its own facts and does not affect any customer other than Co-Steel, except to the extent that if Co-Steel is not assessed its fair share of the statutorily-authorized charges, the shortfall would have to be made up by other utility customers.

The issues raised in Co-Steel's petition have already been carefully considered and decisively rejected by the New Jersey appellate courts. In affirming the BPU's Final Order, the State intermediate court properly concluded that the BPU's decision with respect to Co-Steel's rates was consistent with and represented a reasonable application of the State statute, which did not substantially impair Co-Steel's pre-existing contract nor violate the Contracts Clause or deprive Co-Steel of its lawful rights. (29a-38a). In dismissing Co-Steel's appeal on this issue, the State's highest court correctly found that the appeal does not raise a substantial question arising under the United States Constitution. (11a). Moreover, while the due process issues raised in the petition were not raised by Co-Steel on appeal below, the New Jersey courts carefully considered the due process arguments raised by two other parties and correctly concluded that the parties were provided with the essential requirements of due process and that none of the alleged procedural irregularities rose to the level of a denial of constitutional due process or a violation of State law. (61a; 16sa).

Accordingly, as will be argued herein, the writ should be denied.

A. *As the New Jersey courts have already found, the BPU's decision to apply the statutory rate reductions and stranded costs charges only to Co-Steel's HTS tariff portion of its Special Contract, and not to the already-discounted rate portion of the contract, does not impair the contract nor violate the Contracts Clause*

The United States Constitution, art. 1, sec. 10, provides that "[n]o State shall ... pass any ... Law impairing the Obligation of Contracts ...." Assessing the validity of a Contract Clause claim involves a three part analysis. Courts must consider whether the challenged action, in fact, has caused a substantial impairment of a contractual relationship. If the challenged action has, in fact, caused a substantial impairment of contract, then the second inquiry is whether the regulatory measure came into being for a significant and legitimate public purpose. If a legitimate public purpose has been established, the inquiry shifts to whether the adjustment of the rights and responsibilities of the contracting parties caused by the action is based upon reasonable conditions and is reasonably related to the public goal to be achieved based upon the existing conditions. *United States Trust Co. v. New Jersey,* 431 U.S. 1 (1977).

As a threshold matter, it therefore must be determined whether the challenging party has demonstrated that the state law or regulatory measure has caused a substantial impairment of a contractual relationship. *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 411 (1983). In determining the extent of any impairment, courts are to consider "whether the industry the complaining party has entered has been regulated in the past." *Id.* One whose rights,

such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. *Id.*, citing *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 (1908).

Even assuming a demonstration of a substantial impairment of a preexisting contractual obligation, a Contract Clause violation will not be found simply because the state law affects the rights and obligations created by the contract. The prohibition on impairment of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal or are necessary for the general good of the public. *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 241 (1978).

As the courts below have already found, it is clear that the BPU's decisions in this matter are not violative of the Contracts Clause. As described above, the BPU in its Final Order determined that under EDECA, *N.J.S.A.* 48:3-60, 61, and 67, HTS tariff customers, along with all other customers, (except for onsite generator customers, *N.J.S.A.* 48:3-77), were subject to nonbypassable stranded cost charges (MTC, TBC and SBC). At the same time, these customers would also receive rate reductions totaling 13.9% by August 1, 2002, which reductions were, in part, due to securitization of the stranded costs. The BPU determined that Co-Steel's Block 1 rates, which under the terms of the Special Contract were to be priced at the prevailing HTS rate, would reflect both the stranded cost charges and the rate reductions applicable to all HTS customers. The BPU further determined that the Block 2 rates, which under the terms of the Special Contract were priced at a competitive market-based rate significantly lower than the HTS rate, would remain unchanged for the duration of the Special Contract.

Thus, the BPU did not impair Co-Steel's Special Contract; it simply enforced the contract as written. In fact, as a result of the BPU's Final Order, Co-Steel's rates have decreased from the rates in effect as of July 31, 1999, as a result of the rate reductions applied to its Block 1 rates.[5]

In the appeal below, the NJAD properly applied the applicable law to the specific facts of this case and correctly concluded that "Co-Steel's contract has not been substantially impaired." (35a). The NJAD found that "the BPU's decision was grounded solidly on holding the parties to the terms of Co-Steel's contract with PSE&G," and further noted that "Co-Steel appears to admit that during the term of the contract [EDECA] as applied by the BPU order, will not impair its contract, but will in fact enhance it." (38a; 33a).

As to Co-Steel's arguments that after the expiration of the Special Contract it will be subject to unanticipated stranded cost charges, the NJAD correctly found that Co-Steel's arguments were undermined by its failure to include contingencies for post-contract charges, even though it knew that electric restructuring was likely to occur during the term of the Special Contract. (34a). The NJAD also noted that the

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[5] Co-Steel's suggestion on page 19 of its petition that its rates during the contract term will be higher than originally bargained for is wrong; Co-Steel's contract provides for the inclusion of increases in "demand side management" charges on both its Block 1 and Block 2 rates, which charges were passed through to it in a prior April 1, 1998 Order of the BPU. (107a). Moreover, Co-Steel's claim, at page 9 of the petition, that future stranded cost charges will essentially equal or exceed its savings under the Special Contract, is based on its unsubstantiated and unverified estimate of such charges for a period some 10 years past the expiration of the Special Contract. During the term of the Special Contract, and during the period of the rate reductions mandated by EDECA, it is undisputed that its rates will decline.

express language of Paragraph 9 of the Special Contract (See, page 9-10, *supra*) suggests that "Co-Steel knew that its contractual rights were subject to alteration by state legislation," and thus "cannot have reasonably relied on the immutability of the agreement." (34a-35a). The NJAD also reasoned that the State Legislature had mandated that stranded cost charges be passed along to customers as a cost of service, and, as such, the charges were covered under the plain language of Paragraph 7 of the Special Contract (See, page 9, *supra*). (35a). The NJAD concluded that:

> Co-Steel appears to want a "double bite," the favorable contract rate and the advantages of competition, but none of the associated costs of deregulation. The equities do not favor Co-Steel under these circumstances. Their reliance was not so much detrimental as it was shrewd.
>
> [37a].

For all these reasons, the NJAD correctly found that Co-Steel's contract had not been substantially impaired. Moreover, the NJAD properly concluded that even if Co-Steel could satisfy this first prong of the test, it would fail the second and third prongs, noting that Co-Steel concedes that there is a legitimate purpose behind the collection of stranded costs by utilities, and recognizes EDECA's stated policy to provide for a smooth transition from a regulated to a competitive power supply market and to maintain the financial integrity of the electric public utility through the transition to competition. *N.J.S.A.* 48:3-50(a)(12) and (c) (4). (35a). As noted above, the State's highest appellate court declined to hear an appeal on this issue, finding that Co-Steel did not raise a substantial constitutional question. (11a).

The BPU respectfully submits that the decisions of New Jersey's appellate courts, affirming the BPU's application of EDECA to the unique circumstances of Co-Steel and rejecting Co-Steel's Contracts Clause arguments, are correct and well-reasoned and entirely consistent with applicable law. Accordingly, insofar as it is based on Contracts Clause arguments, the writ should be denied.

B. As the New Jersey courts have already found, the BPU's decision not to apply the statutory rate reductions and stranded costs charges to the Block 2 rates for the duration of the Special Contract does not violate the Equal Protection Clause

Co-Steel's "equal protection" argument is similarly plainly without merit. The Equal Protection Clause requires, that in defining a class subject to legislation, the distinctions that are drawn have "some relevance to the purpose for which the classification is made." *Baxstrom v. Herold*, 383 *U.S.* 107, 111. (1966). The BPU's application of EDECA to the unique circumstances of Co-Steel's Special Contract rates clearly has a rational basis related to the legislative intent.

*N.J.S.A.*48:3-52(d)(1) provides in pertinent part: "During a term to be fixed by the board, each electric public utility shall reduce its aggregate level of rates for each customer class, including any surcharges assessed pursuant to this act, ..." Relying on this provision, Co-Steel alternatively argues that since it takes service as a "class," albeit a special class of one, it is entitled to the rate reductions mandated by EDECA as to both Blocks 1 and 2.

This argument was rejected by the BPU based upon its interpretation of the new statutory provisions. Specifically, the BPU found that " it is much more reasonable to interpret the limited reference to 'customer class' set forth at [*N.J.S.A.* 48:3-52(d)(1)] to mean customers served under fixed tariffs, not customers that have made separate arrangements to receive service at heavily discounted rates." (108a).

The NJAD, in its review of the BPU's decisions, properly found that the interpretation of "customer class" announced by the BPU, the administrative agency charged with the enforcement of EDECA, was reasonable in light of Co-Steel's already-discounted Block 2 rate and should be given great weight by reviewing appellate courts. (38a). In so ruling, the NJAD relied upon well-settled State law regarding statutory interpretation by the implementing agency. *Id.*

While the NJSC Opinions did not address Co-Steel's contract issues directly, in affirming the NJAD's decision, the Majority Opinion noted that the case before the BPU implicates questions of statutory interpretation, and that under well-settled State case law, since the grant of authority to an administrative agency is to be liberally construed to enable the agency to accomplish the Legislature's goals, reviewing courts must defer to the agency's interpretation, provided it is not plainly unreasonable. (5sa-6sa).

Given the unique circumstances of the Special Contract with a heavily discounted Block 2 rate, together with the need to interpret a new statute in a fair and reasonable fashion, it is clear that the BPU acted within its discretionary authority when it determined that the statutory cost charges and rate reductions would apply only to those charges directly tied to the HTS rate and not to the negotiated Block 2 Discounted

Rate. The BPU, in essence, determined to leave the Special Contract as negotiated by the parties, since the Special Contract itself provided that Block 1 rates would be adjusted for changes in the HTS tariff. (106a; 32a).

It is important to note that the intent of EDECA is to lower the current high cost of energy and improve the quality and choice of service for all of the state's residential, business and institutional customers. *N.J.S.A.* 48:3-50(a)(1). To accomplish this, the Legislature determined that certain stranded costs needed to be assessed on all customers, subject to the regulatory discretion of the BPU, to pave the way for competition. Given the legislative intent in this regard, the BPU's determination to apply the rate reductions to Co-Steel's Block 1 HTS tariff rate only, and not to the Block 2 Discounted Rate, is a reasonable interpretation of EDECA. Because the HTS tariff Block 1 rate charged to all HTS customers reflects PSE&G's cost of providing service, including any stranded costs it may incur, it is consistent with the legislative intent that all stranded cost charges and statutory rate reductions under EDECA should apply. However, because Co-Steel's Block 2 Discounted Rate is based on a competitively priced marginal cost of power on the PJM system, the rate reductions and associated stranded cost charges should not apply. This position is well grounded because there is in fact no connection between the statutory rate reductions, with the associated stranded costs, and the Block 2 Discounted Rate. In other words, the Block 1 rates are based on an HTS tariff established to reflect PSE&G's costs, while the Block 2 Discounted Rates are already competitively priced PJM-based rates.[6] This is a fair and

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[6] The Block 2 Discounted Rate is based on the hourly marginal energy cost of the electric consumption (the PJM billing rate or successor rate) plus other adjustments for taxes, line losses and fuel adjustment charges.

reasonable result. In contrast, were the BPU to have adopted Co-Steel's argument on this issue and apply the rate reduction to Block 2, the Block 2 rates, which comprise two-thirds of Co-Steel's usage, would actually be priced below the wholesale marginal cost of energy to serve Co-Steel, clearly an unfair and unreasonable result that is contrary to the legislative intent to "afford fair treatment to all stakeholders during the transition [to full competition]." *N.J.S.A.* 48:3-50(a)(12).

As the NJAD aptly noted in this regard, Co-Steel appears to want a "double bite," the favorable contract rate and the statutory rate reductions on top of its already-discounted rate, but none of the associated costs of deregulation. (37a). In order to forestall Co-Steel's departure from the State and the attendant economic ramifications thereof, Co-Steel was singled out for special treatment in 1995, consistent with the State's Energy Master Plan Committee's recommendation that interim measures be undertaken to retain "at risk" customers. (See, page 3 *supra*). Co-Steel received the benefit of competitive electric rates well before EDECA brought the promise of competitive electric rates to PSE&G's other 200 large volume HTS customers in New Jersey. EDECA was enacted to bring the benefits of competition and lower electric rates to all of the State's customers. In view of the substantial discount in electric rates which Co-Steel has already received and will continue to receive under the Special Contract, and because two-thirds of its discounted rate is governed by precise terms associated with market based marginal cost pricing which predates EDECA and has nothing to do with PSE&G's operations or its need, in conformance with EDECA, to reduce rates by August 1, 2002, it was eminently reasonable for the BPU to limit the applicability of both the stranded cost charges and the statutory rate reductions to that portion of Co-Steel's usage which reflects

the cost of PSE&G's operations, that is, the Block 1 HTS tariff rate. Therefore, the BPU's determination of this issue represents a reasonable interpretation of the legislative intent and constitutes a sensible exercise of its discretion in interpreting a new statute. Accordingly, as to the "Equal Protection" arguments, the writ should also be denied.

C. As the New Jersey courts have already found, all parties were afforded adequate due process in the proceedings below

Notably, the federal due process issues alleged in the writ were not raised by the petitioner below. Significantly, there is no allegation that Co-Steel was precluded from presenting any of its evidence and arguments to the BPU at any stage of the proceedings before the BPU, including the litigation, comment and negotiations phases of the proceeding, or in its subsequent motion for reconsideration. Each and every one of Co-Steel's arguments was carefully considered by the BPU. Moreover, the BPU in its decisions carefully articulated the reasons why Co-Steel's arguments were rejected, consistent with applicable law and based on record evidence. As such, there is no credible basis for Co-Steel to now assert that it was denied due process.

Significantly, the State reviewing courts below considered and rejected procedural challenges to the BPU's decision by the RA and NJBUS, including that the decision violated federal and State due process protections, principles of fundamental fairness, the State's Administrative Procedure Act, the State restructuring statute and the BPU's regulations.

were "unusual" in a number of ways, due in very substantial part to the short time period in which EDECA mandated the onset of retail competition and rate reductions, "unhesitatingly conclude[d]" that the parties were provided with the essential requirements of due process throughout the hearings, comment periods and settlement negotiations, and that none of the alleged procedural irregularities rose to the level of a denial of constitutional due process or State law. (61a). Similarly, the State's highest court, affirming the intermediate appellate court's decision, found no procedural infirmities which would require a remand for additional hearings, finding that the BPU's valuation of PSE&G's generation facilities and its stranded costs determination "were based on years of fact-finding and extensive quasi-judicial and quasi-legislative proceedings" and that the parties "participated fully and vigorously at all stages." (23sa). Thus, there is no important federal due process issue here which requires this Court's review. Accordingly, the writ should be denied with respect to Co-Steel's belatedly-asserted due process issue.

CONCLUSION

For all the above reasons, the New Jersey Board of Public Utilities respectfully submits that Co-Steel Raritan's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CO-STEEL, INC.,

Petitioner,

v.

NEW JERSEY BOARD OF PUBLIC UTILITIES,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of the State of New Jersey

REPLY BRIEF OF PETITIONER

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A. Respondents' Contention That New Jersey Has An Unlimited Right To Modify Contracts Dealing With Matters Subject To Its Regulatory Jurisdiction Demonstrates That This Case Is Of Significant, National Importance And Has Been Resolved Below In A Manner Inconsistent With Previous Decisions Of This Court

Co-Steel has a constitutionally protected property interest in its 1995 contract with Public Service Electric & Gas Company ("PSE&G").[1] At the time the contract was executed by the parties and approved by the State of New Jersey, the contract was expected to reduce Co-Steel's electric costs by $60 million and provide, in a very real sense, the "daily subsistence"[2] required to keep Co-Steel in business and to keep its expenditures and jobs in the State of New Jersey.[3]

Co-Steel gave valuable consideration for the benefits it expected to receive under the contract. Co-Steel abandoned its plans to re-locate to another state and invested $37 million in capital improvements at its Raritan plant. And, Co-Steel agreed to forego for ten years whatever opportunity might be provided by future legislation to obtain electricity from a supplier other than PSE&G.[4]

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[1] Contract rights are a form of constitutionally protected property. *See United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 19 n.16, *reh'g denied* 431 U.S. 975 (1977).

[2] *Goldberg v. Kelly*, 397 U.S. 254, 255, 261-64 (1970).

[3] The BPU's brief incorrectly claims that Co-Steel also received certain tax benefits. BPU Brief at 11. As the BPU well knows, the tax adjustment addressed in the July 20, 1995 Memorandum of Understanding between PSE&G, Co-Steel and the New Jersey Department of the Treasury relates to New Jersey's Gross Receipts and Franchise Unit Tax, which is assessed on energy sales and paid by PSE&G, not Co-Steel. See App., at 441a–443a.

[4] Co-Steel is, therefore, the *only* electric consumer in the State of New Jersey that cannot avail itself of the right to access a competitive supplier that was statutorily established by N.J.S.A 48:3-50(b)(3). Respondents description of the Act as extending to "all customers" (BPU Brief at 5-6)

As both Respondents know full well, the rates of PSE&G's other electric customers did not increase as a result of the price reductions extended to Co-Steel since 1995. PSE&G itself absorbed the loss of revenue. Likewise, and contrary to the express statements in both Respondents' briefs,[5] the contract with Co-Steel could have been honored and none of the transition costs assessed to other electric customers would have increased if the Board had simply reduced PSE&G's total stranded costs by the value of its agreement with Co-Steel. By not doing this, the State of New Jersey has legislatively and administratively negated the economic value that Co-Steel expected to receive under the contract and returned to PSE&G in the form of $60 million[6] in "stranded costs"[7] the $60 million in revenues that PSE&G had agreed to forego in the form of rates.[8]

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will not be true until November 17, 2005, the date the Co-Steel-PSE&G contract expires.

[5] *See* PSE&G Brief at 19, BPU Brief at 17.

[6] BPU's claim that this figure is unsubstantiated (BPU Brief at 20, n. 5) is unfair. The Board knows full well that, because the stranded cost assessment was fixed after the hearings ended, the figure is necessarily a mathematical calculation derived from the record evidence, which was based upon PSE&G's filing before its stranded costs were determined. The record evidence thus supports the even higher calculation that Co-Steel's annual stranded cost surcharge would be $7.5 million, or $112.5 million during the fifteen-year term during which it will be collected. App., at 380a.

[7] PG&E's statement (PSE&G Brief at 16 n.26) that Co-Steel could avoid future stranded costs by self-generation is *entirely* without any record support. As PSE&G must surely know, self-generation to support an electric arc furnace is currently economically and technically infeasible. The additional suggestion that Co-Steel could simply leave the state would defeat the purpose of the contract.

[8] Throughout their briefs Respondents have frequently stated that Co-Steel seeks to pay *none* of the costs associated with the transition to competition. *See, e.g.*, BPU Brief at 25. Respondents know that this is untrue. Co-Steel has never contested the assessment of charges associated with approved social programs, conservation and environmental programs,

This is, of course, an important issue for Co-Steel. Respondents' briefs also demonstrate, however, precisely why this issue is also of significant national importance. For those briefs now make clear that the reason the State, the BPU, and the courts have given short shrift to Co-Steel's claim that the Electric Deregulation and Energy Competition Act[9] ("EDECA") violates the Contracts Clause, is that they do not believe that Co-Steel has any legitimate claim of entitlement whatsoever with regard to the contract. Those briefs also make clear that it really would not have mattered to the BPU or the courts whether Co-Steel had been sufficiently clairvoyant as to anticipate a charge that had not yet been conceived, let alone proposed to be implemented when the contract was under negotiation.[10] It would not have mattered

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as well as nuclear decommissioning and consumer education costs, through the nonbypassable societal benefits charge ("SBC"). Co-Steel opposes only the imposition of the Market Transition Charge ("MTC"), which attempts to recover stranded costs in investment which, because of Co-Steel's non-firm, interruptible service, were never made by PSE&G on behalf of Co-Steel and which PSE&G agreed to forego in the 1995 contract. *See* Testimony of Scott Norwood, App., at 390a-391a.

[9] N.J.S.A. 48:3-49 *et seq.*

[10] One of the consistent themes of Respondents throughout these proceedings has been that Co-Steel was remiss in failing to include a prohibition on the imposition of stranded cost charges in 1995. *See, e.g.*, PSE&G Brief at 15. But that expectation is unreasonable.

Respondents themselves can cite to nothing prior to the BPU's Final Report of April 30, 1997 that could fairly have put anyone on notice that restructuring was likely to involve the kind of stranded cost surcharges that PSE&G finally requested in its petition of July 15, 1997. Moreover, even the April 30, 1997, Final Report acknowledged that legislation was needed "to provide the necessary legal authority to implement its recommendations." App., 24a, cited at BPU Brief at 4.

This is entirely consistent with the testimony from Co-Steel's negotiator, Mr. Dimiceli, that at the time of the contract negotiations he was only "very generally aware that electric industry deregulation was somewhere on the horizon and that it might occur to one degree or another in the succeeding few years" (App., at 407a.) and that "the subject of stranded costs never was raised by PSE&G during the negotiations."

if the contract did not have the provision in Paragraph 7 allowing PSE&G to pass through new taxes or other assessments incurred by PSE&G. It would not even have mattered if the contract did not have the provision in Paragraph 9, acknowledging that the contract was subject to the future exercise of the State's regulatory authority. Respondents' essential argument that they could "harmonize"[11] away every penny of Co-Steel's anticipated economic benefit is ultimately based not on the need to interpret or reconcile any of the contract provisions. Respondents' argument is based on their view that the State's regulatory authority is not only inalienable but that it is also *unlimited!* That argument is unprecedented, and it threatens the integrity of decisions such as *Atlantic Coast Line R.R. Co. v. Goldsboro*,[12] which holds that this power must be reasonably and fairly exercised.[13] This unprecedented assertion of the power to completely negate the value of a contract absent any evidence of emergency takes on added significance when exercised in connection with the transfer of billions of dollars of assets as part of a nationwide regulatory reform movement that is also making the use of electric supply contracts the rule, rather than the exception.

(App., at 407a.) It is also entirely consistent with the testimony of PSE&G's negotiator that he had never even heard of the term "stranded cost" at the time of the negotiations. BPU Tr. 288:22-289:21.

[11] PSE&G Brief at 17.

[12] 232 U.S. 548 (1918).

[13] *See Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-12 (1983) (where a state regulation constitutes a substantial impairment of a contractual relationship the state must have a legitimate public purpose and the adjustment of the contracting parties' rights and responsibilities must be based upon reasonable conditions and of a character appropriate to the public purpose justifying the interference); *see also United States Trust Co. of New York*, 431 U.S. at 22.

B. The Dissenting Opinion of Justice Stein Correctly Identifies The Procedural Irregularities Below And Demonstrates That The Parties Representing Consumer Interests Were Denied Due Process of Law

Of all that has been written in the proceedings below, the Dissenting Opinion of Justice Stein,[14] which was not available to Co-Steel at the time the Petition was filed, gives the most accurate and complete rendition and treatment of the procedural irregularities that the Petition attempted to summarize.[15] Justice Stein stated that he

> fully agree[d] with petitioners' contentions that the lack of an adequate evidentiary hearing concerning the value attributable to PSE&G's stranded assets denied due process to petitioners, and that the evidence in the record was insufficient to support the BPU's generation asset valuation and stranded cost determination.[16]
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> * * *
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> Not only was the restructuring hearing mandated by EDECA never held with respect to the transfer of generation-related assets to GENCO, but also the stranded costs hearing before the ALJ was based on the ultimately incorrect premise that PSE&G would retain its generation assets for seven years. Rather than reopen the hearing as requested, and achieve compliance with the letter and spirit of EDECA, the BPU based its stranded cost calculation on stale evidence before the ALJ focused on income projections but omitting any proof of market-based valuations, and relied heavily on the ICF report that never had been subjected to cross-examination or

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[14] Supp. App., at 31sa-41sa.

[15] Petition at 10-13.

[16] Supp. App., at 31sa.

> rebuttal. In addition, the BPU utterly failed to provide in its Final Order any explanation for selecting ICF's mid-range figure as the basis for valuing PSE&G's stranded costs. Most disturbing is the fact that the BPU's flawed stranded cost valuation, because of its substantial economic impact on customers over the next fifteen years, in all likelihood was the most significant of all of the factual findings in the Final Report.[17]

Respondents discuss such conclusions primarily through the same obfuscations upon which they have relied to minimize the irregularities below. Thus, for example, Respondent PSE&G contends that the post-hearing modification of its plan of operation was of no consequence because it had been a proposal made by "several customers and supplier parties" to which the Company "acquiesced" in the post-hearing settlement negotiations.[18]

An even more elaborate ruse is played out in connection with the BPU's use of the post-hearing report of the independent auditors. As the record demonstrates, there were two reports prepared by the auditors. The first was the valuation report submitted during the evidentiary hearings and on which the auditors were cross-examined.[19] After the Initial Decision of the Administrative Law Judge did not quantify either the value of PSE&G's assets or its stranded costs,[20] the BPU auditors were requested by the Board to submit a second report "to quantify the Company's stranded costs based on the

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[17] Supp. App., at 40sa–41sa.

[18] PSE&G Brief at 10.

[19] PSE&G Brief at 6.

[20] App., at 26a. PSE&G's brief disputes Justice Stein's conclusion regarding the reason why the ALJ failed to quantify the value of these assets, but not the basic fact that the assets were not valued at the time of the Initial Decision. PSE&G Brief at 6 n.10.

ALJ's recommendations."[21] This report "was distributed to all parties in November 1998" in a letter from BPU staff.[22] Significantly, the parties were never informed that the report might itself be considered as evidence by the Board and no party submitted comments upon it.[23] Nonetheless, it was this second report upon which the BPU relied in determining the value of PSE&G's assets and its stranded costs. Given the objections that have since arisen to the BPU's use of that report, the fact that *no* party responded in any way to staff's letter renders it far more likely that the parties saw the report as having no evidentiary significance, and had no notice of the fact that BPU intended to use it as evidence, than that they knowingly waived their right to comment upon it.

In trying to dismiss Justice Stein's conclusions about the two reports, PSE&G weaves a carefully crafted story. At page 6, PSE&G refers to the auditors who prepared the first report "to which all parties had access, and [who] were subject to cross-examination on *that* report . . . ."[24] Significantly, when referring to the *second* report later in that same paragraph, PSE&G states only that "it was distributed to all parties in November 1998."[25] The attempt to fully blur the distinction between the report on which the auditors were cross-examined and the subsequent report on which they were not is brought to fruition at page 10. There, resorting to a technique used throughout its brief, the Company skewed the "incorrect suggest[ion]" that the auditors were from different companies and demonstrates, to the contrary, that "those entities were one and the same."[26] This helpful clarification to

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[21] PSE&G Brief at 6.

[22] BPU Brief at 5.

[23] BPU Brief at 5.

[24] PSE&G Brief at 6 (emphasis added).

[25] PSE&G Brief at 6.

[26] PSE&G Brief at 10 n.18.

a "suggestion" that none of the parties ever made is tied to text stating that auditors "that had prepared the independent audit report" had been subjected to three separate days of cross-examination. The attempt to make it appear that the auditors were subject to cross-examination on the second report is patent, but untrue. Although carefully crafted to obscure reality, PSE&G's brief actually plainly reveals and confirms that although the parties had opportunity to confront and cross-examine the BPU auditors in connection with the report submitted *during* the evidentiary hearing, they had no similar opportunity to confront and cross-examine the authors of the report prepared *after* the hearing. The BPU relied upon that post-hearing report to resolve disputed issues of adjudicative fact and, in so doing, violated fundamental precepts of due process.

C. Respondents Have Failed To Demonstrate That There Is Any Rational Relationship Between The Objectives Of The Act And The Board's Decision To Deny Co-Steel The Statutorily Mandated Rate Reduction On Its "Block 2" Purchases

According to the BPU, "EDECA was enacted to bring the benefits of competition and lower electric rates to *all* of the State's customers."[27] The "pertinent"[28] provision of EDECA states quite clearly and succinctly that, "[d]uring a term to be fixed by the board, each public utility shall reduce its aggregate level of rates for each customer class . . . ."[29] The Board's only discretion relates to the length of the term during which the rate reduction shall apply. With respect to Co-Steel, the Board concluded that the legislature "intended to reduce the rates [only] of customers receiving service under tariffs providing for fixed rates."[30] The BPU concedes,

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[27] BPU Brief at 25.

[28] BPU Brief at 22.

[29] N.J.S.A. 48:3-52(d)(1).

[30] PSE&G Brief at 20.

however, that Co-Steel is served "under the EHEP Tariff,"[31] and the statute clearly makes no distinction between the EHEP Tariff and any other tariff. The exclusion of Co-Steel from the rate reduction mandated by the Act is, therefore, completely inconsistent with the specific language and intent of the Act to lower electric rates to "all customers," which, during the term set by the board, was to be accomplished by a reduction in the aggregate level of rates for each customer class. The BPU's unauthorized exclusion of Co-Steel has, thus, absolutely no rational relationship – indeed, is entirely contrary – to the purpose and express language of the Act and arbitrarily denies Co-Steel the equal protection of the law.

D. The Issues Set Forth In The Petition Were Timely Raised Below

Co-Steel raised its claim that PSE&G's proposal to impose stranded cost charges violated and constituted an impairment of the 1995 contract from the very outset of these proceedings.[32] In light of its limited resources and in the interest of administrative efficiency, Co-Steel relied, as it was entitled to, upon the New Jersey Ratepayer Advocate, as representative of all of PSE&G's consumers,[33] to litigate those issues that Co-Steel had in common with all other consumers.[34] Initially, this included the existence and amount of PSE&G's stranded cost charges,[35] but expanded, as the proceedings progressed, to include a due process challenge to the procedures by which the existence and amount of those

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[31] BPU Brief at 10 n.4.

[32] Petition at 3; App., at 374a-446a.

[33] Petition at 3; N.J.S.A. 13:1D-1, at 29.

[34] It is completely inaccurate to state (e.g., BPU Brief at 7) or simply imply as they do throughout their briefs (*e.g.*,. BPU Brief at 26 and 27) that Co-Steel took "no position" on issues in which they held common positions with and were adequately represented by the Ratepayer Advocate.

[35] Petition at 3.

stranded cost charges had been determined.[36] Since these issues have been litigated below, Co-Steel is entitled to raise them here even if they are not part of the group represented by the Ratepayer Advocate.[37]

In addition, Co-Steel timely raised additional, independent due process and equal protection issues when the BPU excluded Co-Steel's "Block 2" purchases from the Act's mandate that statutory rate reductions should apply to "each customer class."[38] Respondents are wrong, therefore, to state or imply that Co-Steel raised these issues "belatedly."[39]

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[36] Petition at 13-14; App., at 42a. Indeed, Co-Steel would have been content to allow those issues the Ratepayer Advocate to litigate those issues here. Co-Steel included those issues in its own Petition only when it learned that the Ratepayer Advocate had a different view of the date on which a petition was due, given the entry of an order, but not an opinion, below.

[37] Petition at 14 n.42, and cases cited therein.

[38] N.J.S.A. 48:3-52(4)(d); Petition at 6-7. The BPU's assertion (BPU Brief at 2 n.2), that this issue was not among those certified by the court below is incorrect. *See* App., at 5a.

[39] BPU Brief at 27.